Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

REPLY COMMENTS OF GTE SERVICE CORPORATION AND ITS AFFILIATED DOMESTIC TELEPHONE OPERATING COMPANIES IN RESPONSE TO SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

GTE Service Corporation and its affiliated domestic telephone operating companies[1] (collectively AGTE≅) respectfully submit their Reply Comments in the above-captioned docket.

INTRODUCTION AND SUMMARY

[1] GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, The Micronesian Telecommunications Corporation, GTE Midwest Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, Contel of Minnesota, Inc., GTE West Coast Incorporated, and Contel of the South, Inc.

In a statement made just two weeks ago to the Senate Commerce Committee, Chairman Kennard confirmed what GTE explained in its opening comments -- that CLECs are raising billions of dollars in capital and deploying local facilities in markets across the country. As Chairman Kennard reported, there are Anow 20 publicly traded CLECs with a total market capitalization of $33 billion,≅ and in Athe first quarter of 1999 alone, almost a million CLEC access lines were installed.≅[2] These facts about the local marketplace square perfectly with GTE=s own experience, which confirms that CLECs are broadly deploying their own facilities in urban and rural, large and small, markets alike. The drivers of this facilities-based competition -- CLECs like Cox Communications -- counsel the Commission in their comments that Athe current broad availability of UNEs and the Commission=s pricing methodology actually jeopardize the development of facilities-based competition.≅ Cox Comments at 12.

Nevertheless, the Big Three IXCs and other commenters assert that Aserious competition has developed at a snail=s pace, and only in a very few business markets.≅ MCI WorldCom Comments at 3. Indeed, the Big Three go so far as to claim Athat there are today no remotely adequate substitutes for any of≅ the network elements identified by the Commission as possible prospects for unbundling, AT&T Comments at 15, and that Anothing that has happened since≅ 1996 Acould rationally give the Commission any optimism about the success of local competition,≅ Sprint Comments at 43-44. The commenters proffering these demonstrably false assertions support them

[2] Oral Testimony of William E. Kennard Before the Senate Commerce Committee, at 2 (May 26, 1999).

not with actual *facts* about real-world CLECs competing in the local marketplace, but with theoretical *assertions* about the existence of bumps on the road to full-fledged facilities-based competition.

As the Supreme Court made clear, these assertions cannot take the place of actual marketplace facts when the Commission evaluates the Aavailability of elements outside the incumbent=s network.≅ *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 735 (1999). Since 1996, the number of CLECs has grown to more than 1,000 -- an increase of 425 percent -- and these CLECs are experiencing rapid revenue growth. *See* Report of Network Engineering Consultants, Inc. at 1 & Exhibit A (ANECI Report≅) (filed as Appendix B to GTE=s Comments). In the last three years, these CLECs have rapidly deployed facilities in markets across the country -- including 600 new switches in markets as small as LaBelle, Missouri -- and tens of thousands of miles of fiber used to provide both interoffice transport and local access. *See* Peter W. Huber & Evan T. Leo, UNE Fact Report at I-1, II-6 (AUNE Fact Report≅) (submitted with the Comments of USTA). In eight GTE markets that are representative of GTE=s local service territories -- ranging from Dallas, Texas to Oxford Junction, Iowa -- 26 different competitors are providing service over their own facilities. *See* Report of PNR & Associates, Inc. (APNR Report≅) (filed as Appendix D to GTE=s Comments). These GTE competitors self-provide or purchase from non-ILEC sources *every one* of the elements at issue in this proceeding, and self-provide or purchase at wholesale many of the elements -- like switching and transport -- near-uniformly. *Id* at 23. Moreover, the Aaddressable≅ market that could be served by these CLECs= *existing* competitive facilities encompasses virtually all of GTE=s high-value customers and, in some instances, virtually all of GTE=s customers. *See, e.g., id.* at DFW Metroplex 4. Thus, whatever theoretical issues can be identified with employing non-ILEC

alternatives, the record is clear that CLECs with actual capital on the line are competing successfully using substitutes for unbundled GTE elements.

The Big Three and other commenters have attempted to lead the Commission down the primrose path by suggesting that it can ignore this extensively documented factual record. Thus, AT&T asserts that the Supreme Court vacated Rule 319 Aon an extremely narrow and technical ground≅ and made it Aexplicit that it had not remotely called into question the validity of a requirement that incumbent LECs make these seven network elements available to any requesting carrier in the nation.≅ AT&T Comments at 4. This assertion was echoed by others including MCI WorldCom, Sprint, and Qwest -- all of which characterize the ASupreme Court=s remand≅ as Avery limited in scope.≅ Qwest Comments at 3; *see also* MCI WorldCom Comments at 2; Sprint Comments at 5. Indeed, AT&T goes so far as to claim that the Commission can comply with the Supreme Court=s instructions simply by reinstating -- after making an inconsequential alteration in rationale -- its prior rule that Aany increase in the costs to provide service incurred by CLECs that lease network elements will impair their ability to provide service.≅ AT&T Comments at 35.

The Commission should not accept these ill-advised invitations to avoid the work required by the Supreme Court. As GTE stated in its Comments, this proceeding offers the Commission the choice between ensuring that the pace of competition continues to grow or derailing the competitive process by destroying incentives for both ILECs and CLECs to invest in new facilities. This cautionary note was also sounded by facilities-based CLECs like Cox Communications and Focal Communications, which stand the most to lose if competitors are free to purchase ILEC elements -- either alone or in combination -- at prices that manifestly disadvantage CLECs with actual facilities.

See, e.g., Cox Comments at 3. The Commission should recognize, as Justice Breyer concluded, that the Act=s unbundling standards Arequire balance,≅ *Iowa Utils. Bd.*, 119 S. Ct . at 754 (Breyer, J., concurring in part and dissenting in part) -- a balance that can be struck if the Commission affords CLECs access to unbundled ILEC elements only where the element is essential to competition and there is convincing *factual* evidence that CLECs cannot effectively compete using substitutes for the element.

REPLY DISCUSSION

I. THE LEGAL AND ECONOMIC STANDARDS THAT GOVERN UNBUNDLING OBLIGATIONS UNDER SECTION 251(d)(2).

A. Overbroad Unbundling Rules Destroy, Not Enhance, Incentives For CLECs and ILECs To Invest in New Facilities. Such Requirements Would Therefore Run Afoul of Section 251(d)(2) and Frustrate the Act=s Purpose of Promoting Competition.

It is an elementary principle of economics -- as universal as the law of gravity -- that making an item available at a lower price encourages purchasers to buy that item more frequently and rely less often on substitutes. Likewise, it is an elementary principle of competition that affording firms access to a competitor=s property at a price based on an assumption of perfect forward-looking efficiency -- a state that no player in the market can actually achieve -- destroys incentives such competitors have to rely on alternative sources for that input. This outcome is highly anticompetitive because competition is driven by CLEC incentives to improve upon ILEC inputs or find a way to provide service with an alternative input. This development provokes the incumbent to respond in kind, making its own investments to improve upon the service of its competitors. As Professor Kahn states, the Amost creative and productive form of competition is innovation -- in the methods of

producing and supplying existing products and services and in developing new product and service offerings.≅ Declaration of Alfred E. Kahn at 4 (AKahn Declaration≅) (filed as Appendix A to GTE=s Comments). This fact was also recognized by Congress, whose express preference for the Adeployment≅ by competitors of new Atechnologies≅ underscores the fact that genuine innovation in telecommunications markets depends on investment in facilities. Pub. L. No. 104-104, 110 Stat. 56 (1996); H.R. Conf. Rep. No. 104-458, at 1 (1996).

It is widely accepted among leading economists and antitrust commentators that sharing requirements significantly diminish the incentives for both competitors and incumbents to innovate through investment in their own facilities.[3] Since it is both risky and expensive for CLECs to deploy their own substitute network elements, the safe and easy course, from the perspective of a new entrant, is to avoid that risk by relying entirely on ILEC elements. Imposing mandatory sharing requirements when substitutes are available also undermines the investment incentives of existing players in the market. CLECs who have already deployed their own facilities will be hampered in their ability to compete if other CLECs can secure the same facilities from the ILEC at lower regulated prices. Because a sharing requirement will lower the returns these firms reasonably expected to receive on their investments, their incentive to continue to invest in competitive facilities would be severely diminished.[4] Likewise, ILECs will have diminished incentives to invest in

[3] *See* Kahn Declaration at 4 (because Acompetition and innovation themselves consist in a quest for differential advantage, a requirement that the benefits be shared, on regulatorily dictated terms, in the cases in which that quest has been successful would interfere with the competitive process itself≅); 3A Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW 174 (1996) (AAreeda & Hovenkamp, ANTITRUST LAW≅) (Athe right to share a monopoly discourages firms from developing their own alternative inputs≅).

[4] Kahn Declaration at 8 (overbroad sharing requirements Adiscourage new, risky investment≅ by

upgrading and improving their own facilities because any such gains would have to be shared with competitors.[5]

Facilities-based CLECs,[6] like Cox Communications, have invested billions in their own networks and will face the most severe competitive disadvantages if competitors are afforded access to ILEC elements that are otherwise available in the marketplace. These commenters agree that a Aregulatory regime that fosters the broad availability of incrementally priced UNEs discourages

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A*existing* facilities-based CLECs, which have already invested billions of dollars of their own capital in challenging the historical monopolists and are investing more each year≅) (emphasis in original).

[5] MCI WorldCom asserts that the Commission should not consider the deleterious effects its unbundling rules may have on ILEC incentives to innovate because Amost of the innovation and high-risk investment that takes place in the telecommunications industry is undertaken by equipment vendors,≅ and because ILECs Ado not usually invest large sums of money in high-risk enterprises.≅ MCI WorldCom Comments at 9. This claim reflects the results the Big Three *hope* to achieve in this proceeding -- crippling ILEC incentives to invest in their own networks -- and not the *current* reality of the marketplace. ILECs are, for example, making significant investments in the provision of xDSL service -- although these investments are outpaced by CLECs -- in recognition of the fact that the voice and data markets are rapidly converging. UNE Fact Report at VI-19.

[6] GTE refers to Afacilities-based CLECs≅ as being those competitors that self-supply one or more network elements.

competing carriers from building their own networks and leaves them dependent over the long term on the ILECs, to the detriment of the public interest.≅ Cox Comments at 3. Thus, Cox concludes that the Act=s Aframework strongly suggests that Congress intended to incent competing telecommunications carriers . . . to build their own facilities and to rely as little as possible on the incumbent=s infrastructure.≅ *Id.* at 9. Likewise, WinStar states in its comments that Arelying on access to traditional unbundled network elements, in the long run, simply will not result in innovative services nor in a competitive marketplace sustainable other than through the artificial hand of regulation.≅ WinStar Comments at 3.

Nevertheless, the Big Three argue that requiring ILECs to unbundle network elements -- even when substitutes are widely available in the marketplace -- actually *enhances* the incentive of CLECs to deploy their own facilities. They assert, for example, that Anetwork elements provide a critical transition to facilities-based competition because they permit entrants to learn aspects of the business, such as their customer=s calling volumes and traffic patterns, that will be essential to their subsequent decisions on whether and where to deploy facilities.≅ AT&T Comments at 21. Ultimately, the Big Three go so far as to claim that CLECs can Agenerate sufficient revenues and customers to warrant the construction of new facilities≅ A*[o]nly* by being allowed to lease facilities,≅ and therefore that the Aavailability of unbundled network elements at cost-based rates≅ is a A*necessary precondition*≅ to the construction of new facilities. MCI WorldCom Comments at 8 (emphasis added).[7] These

[7] *See also* Sprint Comments at 19 (A[E]ven where self-provisioning is a feasible strategy in the long run, it may be necessary to enter the market first using facilities from others for a period of time, while building the customer base needed for economic self-provisioning.≅); Qwest Comments at 12 (AQwest submits that the Commission will facilitate efficient facilities deployment if competitors can

commenters thus conclude that the Commission should adopt the broadest possible unbundling requirements Abecause access to LEC network elements can only advance and never retard the 1996 Act=s objectives in both the short and long terms.≅ AT&T Comments at 21-22.

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decide whether to deploy local facilities by first entering markets and serving customers with UNEs.≅).

These contentions are absurd, belied as they are by three years of history. In the eight typical GTE markets studied in the PNR Report, for example, CLECs have deployed fiber networks so ubiquitous that they can reach as many as 97 percent of the addressable business and residential customers. PNR Report at DFW Metroplex 4. As the following table makes clear, these facilities-based CLECs *do not* use UNEs as a bridge to building new facilities.[8]

TAMPA AREA (GTE Service Territory)			
CLEC	**Bypass**	**Resale Lines**	**UNE Loops**
AT&T	192	33	16
e.spire	1,310	2,940	14
Intermedia	2,000	4,750	
MCI WorldCom	10,117	18	7
Time Warner Telecom	125		
US LEC	74		
WinStar	2,000	9	

[8] PNR Report at 14. The column labeled ABypass≅ reports the number of lines served by each CLEC without the use of unbundled ILEC elements or resale.

Rather, CLECs typically build facilities in target markets based on capital-market-tested business plans *before* attempting to build a customer base in that market. To the extent that a transitional mechanism is required for CLECs to ramp up their service offerings and secure information about market conditions, resale is by far the preferred method. *See* Reply Declaration of Alfred E. Kahn at 4 (AKahn Reply Declaration≅) (filed herewith as Appendix A). This fact is confirmed by the experience of AT&T and MCI WorldCom themselves, who together have deployed 12 switches and seven SONET rings used to provide transport and local access in the eight studied GTE markets -- all with little or no reliance on UNE-based service as a getting-started strategy. PNR Report at 30, 72. There is therefore no question -- based on real-world evidence as opposed to speculation -- that the Aavailability of unbundled network elements at cost-based rates≅ is *not* a Anecessary precondition≅ to the construction of new facilities. MCI WorldCom Comments at 8.

The Big Three likewise argue that overbroad unbundling rules will not deter CLECs from deploying facilities because no Arational company would pursue a business strategy that makes it dependent on the long-term cooperation of a single dominant rival.≅ *Id.* at 26; *see also* Sprint Comments at 19 (A[A]ny carrier desiring a significant market presence over the long term must consider self-provisioning as the most desirable business strategy -- indeed, the only strategy that can ensure that a carrier is the master of its own fate.≅). These assertions are directly contradicted by the Big Three=s own comments, which make it clear that they would be happy to provide mass market service indefinitely relying solely on unbundled ILEC elements. One rationale offered by the Big Three for why the Commission should require ILECs to provide the UNE Platform is that it is Aindispensable to permit competition in those areas of the country where alternative facilities will

never be feasible.≅ AT&T Comments at 23. Nevertheless, AT&T promises that the UNE Platform will bring Athe immediate development of mass market competition≅ in these markets. *Id.* at 2. It is therefore clear that CLECs would be *perfectly content* to provide UNE-based service purchased at TELRIC prices even in markets where they have no plans to deploy facilities.

Given this fact, it is absurd to contend, as do the Big Three, that granting CLECs the ability to rely on the UNE Platform will not discourage them from building their own facilities. The primary commenters supporting the Platform -- long distance companies like the Big Three and a trade organization representing IXCs with few of their own facilities -- have no incentive to see the Commission adopt rules that will promote facilities-based competition.[9] Existing facilities-based CLECs, on the other hand, do not support requiring ILECs to provide a pre-assembled UNE Platform at TELRIC prices. Unlike the Big Three -- who have every incentive to *slow* the pace of local competition to protect their core long distance business from RBOC competition -- facilities-based CLECs stand to lose billions of dollars of invested capital if competitors are able to undercut their prices *without* making any of their own investments. Thus, Cox Communications concludes that,

[9] Given that AT&T is now implementing a multi-billion dollar cable-based strategy for local entry, its effort to reinstate a "soup to nuts" blanket unbundling requirement can only be intended to achieve one goal -- undermining ILEC investment in traditional wireline telephone networks. Why else would a competitor like AT&T that has chosen to invest heavily in its own alternative networks wish to advocate a rule that is designed to serve CLECs who do not have their own facilities? After all, AT&T well recognizes that a sharing obligation undermines the investment incentives of the incumbent. Thus, when it was recently suggested that the AT&T-TCI cable networks should be subject to parallel unbundling and resale obligations, AT&T Chairman C. Michael Armstrong protested that "[n]o company will invest billions of dollars to become a facilities-based broadband services provider if competitors who have not invested a penny of capital, nor taken an ounce of risk, can come along and get a free ride on the investments and risks of others." Armstrong Fires Back at Critics of TCI Deal, TR Daily.

given the Act=s goal of Afostering facilities-based competition,≅ Congress Adid not intend that nonproprietary UNEs at any level of granularity be made readily available to all comers.≅ Cox Comments at 25. Likewise, facilities-based Focal Communications concludes that the Commission cannot make the UNE Platform available Aat TELRIC≅ without undermining the core purpose of the Act. Focal Comments at 5.

These CLECs recognize what Professor Kahn made explicit -- that Athe mandatory offer of an entire >platform= deters facilities-based competition across the board.≅ Kahn Declaration at 8. Because the Supreme Court made clear that CLECs are only entitled to the UNE Platform if every element in the Platform meets the section 351(d)(2) standard, *Iowa Utils. Bd.*, 119 S. Ct. at 737, and because numerous elements like switching, signaling, and OS/DA fail this test, the Commission cannot require ILECs to offer unbundled Platform access.

B. Relevant Competition Law Principles Dictate that an Element Will Meet the AImpair≅ Test Only If It Is Essential To Competition and There Is Convincing Evidence That CLECs Cannot Effectively Compete Using Substitutes for the Element.

None of the commenters supporting expansive unbundling requirements deny the Supreme Court=s oft-repeated conclusion that Congress is Apresumed to intend≅ the Ajudicially settled meaning≅ of terms or concepts used in a statute,[10] and that any reasonable method of statutory construction Amust take into account≅ the Acontemporary legal context≅ in which a statute is enacted.[11] Likewise, these commenters identify no other rule within the Act=s Acontemporary legal context,≅ apart from the essential facilities doctrine, that is analogous to section 251(d)(2)=s requirement that ILECs share certain facilities with competitors. Although it is clear that the Act does not require the Commission to apply every element of the judicial essential facilities doctrine, it is equally clear that the principles underlying this doctrine -- which, like the Act, are designed to promote competition -- should guide the Commission=s interpretation of section 251(d)(2).

This fact is confirmed by the Act=s legislative history. Congress expressly stated that the Act=s rules were designed to eliminate ILECs= Abottleneck control over the essential facilities needed for the provision of local telephone service.≅ H.R. Rep. No. 104-204, at 49 (1995). The only statement the Big Three could find that discusses the essential facilities doctrine -- identified by MCI WorldCom at 35-36 -- *wholly supports* the Commission=s use of the competition principles

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[10] *American Nat=l Red Cross v. S.G. & A.E.*, 505 U.S. 247, 252 (1992); *see also Traynor v. Turnage*, 485 U.S. 535, 546 (1988); *Director, Office of Workers Compensation Programs v. Perini North River Assoc.*, 459 U.S. 297, 319-20 (1983).

[11] *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979); *see also id.* at 699 (Court presumes Athat Congress was thoroughly familiar with . . . important precedents from [the Supreme Court] and other federal courts and that it expected its enactment to be interpreted in conformity with them≅); *Morse v. Republican Party of Va.*, 517 U.S. 186, 230-31 (1996) (interpreter of statute must look to A>backdrop= of decisions≅ against which ACongress acted≅).

underlying the doctrine to interpret section 251(d)(2). A 1994 House version of the Act required ILECs to Aoffer unbundled features, functions, or capabilities whenever technically feasible and economically reasonable,≅ and contained no analog to section 251(d)(2)=s Anecessary≅ and Aimpair≅ standards. H.R. Res. 3636, 103d Cong. ∋ 102(c)(1)(B)(ii) (1994). Criticizing this open-ended approach to unbundling -- the same approach proffered by the Big Three here -- Rep. Crapo of Idaho stated that if Aour *objective is competition*, interconnection ought to be *restricted to essential facilities*≅ and should not be expanded so broadly as to allow Anew communications entrants to piecepart the public network at their whim.≅ 140 Cong. Rec. H5216, H5243 (daily ed. June 28, 1994) (emphasis added). There is no dispute that the Act=s objective is -- as Rep. Crapo stated -- to promote competition. The legislative history therefore speaks with a uniform voice in favor of interpreting section 251(d)(2) in light of the competition principles underlying the essential facilities doctrine.

The Big Three and other commenters miss the point of using the *principles* underlying the essential facilities doctrine -- and not the judicially applied doctrine itself -- to interpret section 251(d)(2)=s unbundling requirements. Competition law limits the compelled sharing of facilities to circumstances when firms cannot compete effectively without access because sharing requirements significantly diminish the incentives for competitors and incumbents to innovate and invest in their own facilities. It is irrelevant that the Aessential facilities doctrine does not apply to

circumstances in which the law seeks to eliminate an existing monopoly,≅[12] that the AAct does not refer to >essential facilities,=≅[13] or that the purpose of the Act generally Ais more aggressive than the objective of the antitrust laws.≅[14] The Act does not require the Commission to apply every element of the essential facilities doctrine as would a court. As MCI WorldCom itself states, a CLEC is neither required to prove that an ILEC A>willfully maintained= or acquired a monopoly≅ to establish its right to purchase unbundled ILEC elements. MCI WorldCom Comments at 33. By imposing a statutory unbundling obligation in section 251, the Act obviates any need for the Commission to apply these exclusionary conduct elements of the essential facilities doctrine.[15]

But the Act does not obviate the need for the Commission to guarantee that CLEC and ILEC incentives to invest in facilities are not diluted by extending unbundling obligations to elements for which substitutes are readily available in the marketplace.[16] Indeed, the Act commends precisely the

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[12] AT&T Comments at 12.

[13] *Id.* at 48; *see also* Sprint Comments at 14; ALTS Comments at 32-33.

[14] AT&T Comments at 49; *see also* Sprint Comments at 15 (AThe antitrust milieu is far different than the pro-active framework of ə 251.≅); MCI WorldCom Comments (A[T]he AAct goes much further, and imposes affirmative market-opening requirements, irrespective of whether ILECs could be shown to have willfully maintained a monopoly in the past or whether they are willfully maintaining a monopoly now.≅).

[15] The fact that Congress included an antitrust savings clause in the Act therefore does not, as asserted by MCI WorldCom and others, suggest that Congress Awas granting new rights and remedies under the Act, not merely codifying previously existing ones.≅ MCI WorldCom Comments at 32; *see also* Sprint Comments at 14. Because section 251(d)(2) is not coterminous with the judicially applied essential facilities doctrine, the Act=s antitrust savings clause does not create any remedies duplicative of those granted by the Sherman Act.

[16] MCI WorldCom=s statement that the Act omits a requirement -- contained in an earlier version of the statute -- that only LECs with Amarket power≅ be subject to unbundling obligations says

opposite result. Following these governing principles, the Commission should rule that Athe failure to provide access≅ to any particular network element would Aimpair≅ CLECs= ability to provide service within the meaning of section 251(d)(2)(B) only where the element in question is essential to competition and there is convincing evidence that CLECs cannot effectively compete using substitutes for the element.

The alternative formulations of the Aimpair≅ test proffered by the Big Three and others cannot be squared either with the plain terms of section 251(d)(2) or with the Act=s purpose of promoting competition. *First*, AT&T suggests that the Commission can simply reinstate its old interpretation of section 251(d)(2)=s Aimpair≅ test and require ILECs to provide unbundled access to an element whenever CLECs relying on substitutes would bear Aany increase≅ in cost. Despite the fact that this very same articulation of Aimpair≅ was rejected by the Court as being Asimply not in accord with the ordinary and fair meaning≅ of the Act, AT&T contends that a CLEC Acannot anticipate >handsome= -- or indeed any -- profits if it is forced to incur higher costs (or provide a more limited or lower quality service) because it is required to obtain one or more elements through self-provisioning or sources other than the LECs.≅ AT&T Comments at 8. Thus, according to AT&T, Aunder current market conditions, >any increase= in the costs to provide service incurred by CLECs that lease network elements will impair their ability to provide service.≅ *Id.* at 35.

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nothing about whether the Commission should interpret section 251(d)(2) in light of the competition principles underlying the essential facilities doctrine. MCI WorldCom Comments at 36.

This interpretation of the Act -- even if it were not expressly foreclosed by the Supreme Court=s decision -- simply cannot be squared with the facts. As Chairman Kennard noted, there are A10 publicly traded CLECs with a total market capitalization of $33 billion.≅[17] The capital markets would not be so solicitous of these companies if their prospects for success could be destroyed by an insignificant cost increase. Likewise, the factual record is replete with evidence that CLECs are experiencing extraordinary revenue growth. Taking just one example of a facilities-based CLEC operating extensively in GTE=s territory, e.spire, which earned only $0.3 million in revenues in 1995, collected $156.7 million in 1998 (an increase of 12,967 percent) and earned $58.1 million in the first quarter of 1999. NECI Report at 22. Numerous other CLECs are experiencing similar revenue growth -- belying AT&T=s ludicrous assertion that any increase in cost could Aimpair≅ these competitors=s ability to compete.

Second, MCI WorldCom and others argue that a CLEC is impaired if its Aability to offer service is materially diminished≅ by denial of access to an unbundled element. MCI WorldCom Comments at i; *see also* Sprint Comments at 10-11; ALTS Comments at i. Although this standard sounds more stringent than that proposed by AT&T, in fact it is not. Thus, MCI WorldCom suggests that its formulation of the Aimpair≅ test will be met if an element=s unavailability: (i) Athreatens the ability of a CLEC to earn a reasonable return on capital . . . for any class of customers or in any geographic area≅; (ii) Aif lack of access to an element precludes CLECs from offering a single Afeature≅ or Acapability≅; or (iii) Aif lack of access would delay≅ -- by as little as one day --

[17] Oral Testimony of William E. Kennard Before the Senate Commerce Committee, at 2 (May 26, 1999).

ACLECs= ability to provide service to any class of customers or any geographic area.≅ MCI WorldCom Comments at 18. Again, the marketplace evidence confirms that CLECs are successfully competing using substitutes for ILEC elements, even when they have to bear these *de minimis* costs.

Third, Sprint claims that section 251(d)(2) applies, in its entirety, only to proprietary elements and that the Commission should not apply the Aimpair≅ test to any elements without proprietary protocols. Sprint Comments at 11. Thus, under Sprint=s interpretation, Aif access is denied because the UNE is not >necessary,= э 251(d)(2)(B) requires that the Commission consider whether reliance on an alterative would >impair= the requesting carrier=s ability to provide≅ service. *Id.* at 11-12. Sprint contends that this interpretation of the Act is the only one that can be reconciled with section 251(c)(3)=s Abroad duty to provide UNEs to >any requesting carrier.=≅ *Id.* at 12. But this position -- which the Commission rejected in the *First Report and Order* -- does not reasonably interpret the phrase Asuch network elements≅ in section 251(d)(2)(B), which plainly refers back to the general antecedent phrase Awhat network elements should be made available≅ in the opening sentence of section 251(d)(2). Nor does section 251(c)(3) provide any support for Sprint=s interpretation. That section, as the Supreme Court concluded, only Aindicates where unbundled access must occur, not which [network] elements must be unbundled.≅ *Iowa Utils. Bd.*, 119 S. Ct. at 736. The Commission would therefore have no basis to conclude, as Sprint urges, that its discretion to require unbundled access to nonproprietary ILEC elements is entirely unfettered.

Finally, Qwest proposes a formulation of the Aimpair≅ test that requires ILECs to continue providing unbundled access to an element until Aa sufficient number of wholesale vendors . . . produce effective wholesale competition for≅ the element. Qwest Comments at 16 (emphasis

omitted). Thus, according to Qwest, the Afact that some CLECs today are engaging in self-supply of network elements is . . . not evidence of lack of impairment.≅ *Id.* at 18. This formulation of the Aimpair≅ test is absurd given that CLECs in every kind of market are self-providing their own substitute elements. In the eight GTE territories studied by PNR, for example, every facilities-based CLEC self-provides switching and numerous CLECs self-provide transport, operator services and directory assistance, signaling, and loops. Exempting these CLECs from the Aimpair≅ calculus would not be faithful to the Supreme Court=s command that the Commission take account of the Aavailability of elements outside the incumbent=s network.≅ *Iowa Utils. Bd.*, 119 S. Ct. at 735. Moreover, such a rule would destroy any incentive for CLECs to self-provide elements and would disadvantage CLECs that already have facilities in place. Qwest=s Awholesale market≅ interpretation of Aimpair≅ therefore cannot be squared with either the text or purpose of section 251(d)(2).

The Big Three and other commenters also attempt to circumvent the force of section 251(d)(2)=s Aimpair≅ test by suggesting that the ACommission is free to identify and give appropriate weight to other factors as it sees fit≅ and that Alack of impairment . . . does not automatically mean that ILECs have a right to deny access≅ to a particular element. MCI WorldCom Comments at 22.[18] These assertions are supported by citations to court of appeals cases suggesting that the Commission, when generally charged with Aconsidering≅ a factor, is not required Ato give

[18] *See also* AT&T Comments at 37 (Commission Amay choose to give≅ the section 251(d)(2) factors Aweight, but it is not required to give them any weight at all≅); Sprint Comments at 26 (AAs long as the Commission gives due consideration to the necessary and impair clauses, it need not attempt to attach any specific weight to those requirements.≅).

any specific weight to it.≅ AT&T Comments at 37 (quoting *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995)).

But here the Supreme Court expressly instructed the Commission to Agiv[e] some substance to the >necessary= and >impair= requirements≅ in determining which elements must be unbundled. *Iowa Utils. Bd.*, 119 S. Ct. at 736. Interpreting the Act in a way that disregards these standards cannot be squared with the Court=s command or the plain meaning of the phrase Aat a minimum≅ in section 251(d)(2). By requiring the Commission to consider *at a minimum* the Anecessary≅ and Aimpair≅ standards when determining which elements to unbundle, section 251(d)(2) expressly sets out baseline criteria that must be satisfied before a sharing obligation can be imposed. It also gives the Commission authority to consider *additional* factors when making this determination, and to refrain from imposing unbundling obligations on elements that satisfy the Anecessary≅ and Aimpair≅ standards -- but only if doing so would serve the objective of competition. Any rule predicated on the assumption that these standards could be disregarded would have the opposite effect; it would drain the Anecessary≅ and Aimpair≅ requirements of their substance.

The Commission therefore cannot base its unbundling rules on any of the additional factors suggested by the Big Three. AT&T, for example, asserts that the Commission should require ILECs to unbundle elements that do not satisfy the Aimpair≅ test if Aany increase in the cost of service or decrease in its quality or scope≅ results from CLECs= use of a substitute. AT&T Comments at 9. But the Supreme Court=s mandate cannot be so easily evaded. The Court squarely held that unbundling requirements predicated on so low a threshold are Anot in accord with the ordinary and fair meaning≅ of section 251(d)(2), *Iowa Utils. Bd.*, 119 S. Ct. at 735 -- a decision that cannot be

circumvented by AT&T=s assertion that the word Aconsider≅ gives the Commission discretion to ignore the plain language of the Act.

Likewise, the Commission should reject MCI WorldCom=s suggestion that ILECs can be ordered to unbundle elements that do not satisfy the Aimpair≅ test if doing so would allow CLECs to Aprovide ubiquitous service≅ or serve Aall categories of customers.≅ MCI WorldCom Comments at 23-24. These goals will already be served if the Commission establishes unbundling rules that reflect actual marketplace realities and differentiate -- as CLECs in the market currently do -- between elements that serve customers of different sizes. Moreover, the Commission should reject MCI WorldCom=s request that ILECs be made to unbundle elements that do not meet the Aimpair≅ test in order to Ajumpstart local competition.≅ *Id.* at 24. As Professor Kahn makes clear, overbroad unbundling rules destroy, not jumpstart, competition by eliminating any incentive CLECs have to deploy their own facilities. *See* Kahn Declaration at 6. The Commission therefore cannot Aconsider≅ this additional factor without contravening the text and purpose of section 251(d)(2).

Finally, the Big Three contend that the Commission should require ILECs to provide unbundled access to elements identified in the section 271 checklist even if those elements fail to satisfy the Aimpair≅ test. MCI WorldCom Comments at 23; Sprint Comments at 27. But it would violate the substantive requirements of section 251(d)(2) to impose unbundling obligations on non-BOC ILECs, like GTE, by virtue of the checklist requirements that apply only to BOCs under section 271. Moreover, the fact that Congress more than three years ago included certain elements in the section 271 competitive checklist says nothing about whether CLECs can *currently* compete effectively without access to those elements. Neither Congress -- nor the Court, which instructed the

Commission to make a timely examination of the availability of substitutes outside ILECs= networks -- believe that section 271's checklist should supersede

the Act=s purpose of promoting competition and the plain text of section 251(d)(2).

C. The Commission=s Unbundling Requirements Must Be Tailored To Match Differences in the Availability of Substitutes in Particular Geographic Markets.

Application of the Aimpair≅ standard to particular elements must be tailored to accommodate differences in the availability of substitutes within the relevant geographic market for each network element. Before the Commission requires an element to be unbundled, it therefore must determine the proper scope of the geographic market for that element, and it should impose an unbundling obligation only in those markets where the ILEC=s network element is the only reasonable alternative available to competitors. The Supreme Court=s remand order made this requirement explicit by instructing the Commission to adopt rules that reflect the Aavailability of elements outside the incumbent=s network.≅ *Iowa Utils. Bd.*, 119 S. Ct. at 735. Because the geographic scope for the available supply and use of substitutes necessarily differs by element, the Commission may not adopt a single uniform Aone size fits all≅ national unbundling requirement that ignores relevant market differences.

The need for the Commission=s rules to reflect these differences in geographic markets is demonstrated by the comments of numerous state commissions, who have spent the past three years collecting and reviewing factual evidence on the availability of alternatives to ILEC elements in different geographic markets. Based on a review of this evidence, the Texas PUC counsels the Commission that the Aavailability of network elements from sources other than the ILEC varies quite

significantly, depending on the particular element sought and the location of the element.≅ Texas PUC Comments at 13. Likewise, the Florida PSC states that the Aavailability of UNEs from providers other than ILECs is likely to vary considerably both within a state as well as among states,≅ and that Aan impairment analysis must take into consideration whether viable facilities-based providers of network functionalities and components, other than the incumbent LECs, exist in a specific geographic locale.≅ Florida PSC Comments at 6-7. The Ohio PUC agrees, stating that the analysis required by section 251(d)(2) is Alargely fact-intensive or specific to a particular geographic region or market.≅ Ohio PUC Comments at 21.

The Big Three attempt to dissuade the Commission from taking proper account of these differences in geographic markets by suggesting that Athe availability of usable alternatives throughout the country spans only the narrow range between very slight and none.≅ AT&T Comments at 45. AAs a consequence,≅ the Big Three conclude, the Alocalized analyses that the LECs seek to require would, if concluded correctly, lead at this time to a nationally uniform result in any event.≅ *Id*; *see also* Sprint Comments at 8 (A[C]ompetition today is in such a state of infancy that it is fruitless to consider, at this time, any form of geographic differentiation in the baseline set of elements.≅).[19] These assertions cannot be squared with the facts. As exhaustively detailed by the UNE Fact Report, the PNR Report, and the NECI Report, substitutes for unbundled ILEC elements

[19] ALTS likewise argues that A[n]ational minimum unbundling standards remain the most efficient way to spur widespread development of local competition,≅ and asserts that the Commission should not take account of any differences in geographic markets until Aafter an initial two year gestation period.≅ ALTS Comments at 4, 8.

are widely used in every kind of geographic market, with substitutes for transport and loops currently available primarily in densely populated areas.

The Commission can develop rules that take account of these differences without conducting an individualized adjudication into the conditions prevailing in every geographic market. For switching, operator services and directory assistance, and signaling, competitive alternatives are available on a national basis such that these elements should not be subject to unbundling. For transport and loops, the Commission can readily adopt workable standards -- wire centers with 15,000 or more lines for transport, and customers with 20 or more lines for loops -- that reflect the availability and use of competitive substitutes in the marketplace. These rules will be national in their application and will therefore afford all of the predictability required for CLECs Ato formulate and execute national business plans to offer local service.≅ MCI WorldCom Comments at ii. Moreover, these rules will guarantee that competition is not stifled in areas where competitive substitutes are available -- a result that cannot be squared with section 251(d)(2) or the Supreme Court=s mandate. As MCI WorldCom concedes, an unbundling Arule that generally leads to the correct result and does so without any delay or confusion is far superior to a rule designed to respond to the infrequent case.≅ *Id.* at 10.

Commenters have suggested three different approaches the Commission might adopt that would fail to account for important differences among geographic markets. *First*, the state commissions advocate a regime that allows the states to add or subtract elements from the Commission=s unbundling requirements.[20] Section 251(d)(2) expressly tasks the *Commission* Ato

[20] *See* Texas PUC Comments at 3; California PUC Comments at 7-11; Florida PSC Comments at

determine≅ -- after applying the Anecessary≅ and Aimpair≅ standards -- which ILEC elements should be unbundled. The limits these standards impose on ILEC unbundling obligations cannot be ignored or supplemented without harming competition. Because section 251(d)(3) expressly provides that states cannot adopt mandates inconsistent with section 251(d)(2) or the Act=s procompetitive Apurposes,≅ the Commission should reject any suggestion that the states have authority to predicate additional unbundling obligations on the dictates of state or federal law. As Justice Breyer concluded, Athe statute=s unbundling requirements, read in light of the Act=s basic purposes, require balance.≅ *Iowa Utils. Bd.*, 119 S. Ct. at 754 (Breyer, J., concurring in part and dissenting in part). This balance struck by Congress in section 251(d)(2)=s Anecessary≅ and Aimpair≅ standards could only be frustrated by a state=s efforts to expand or contract the Act=s unbundling obligations.

Second, AT&T asserts that a CLEC is impaired in its ability to offer service if an alternative will not allow it Ato provide mass-based residential service.≅ AT&T Comments at 29; *see also* Competitive Telecommunications Ass=n Comments at 28 (A[T]he requesting carrier should be presumed to be attempting to enter the market on both a business and residential basis.≅). It likewise claims that GTE has Aturn[ed] the statute on its head≅ by suggesting that the Commission should consider -- in determining that CLECs are impaired without access to an element -- that ACLECs effectively compete by initially targeting business centers or pockets of high-value customers.≅ AT&T Comments at 29. AT&T characterizes this as an Aadmission that broad scale mass market

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7-8; Ohio PUC Comments at 7.

competition will not occur today in the absence of network elements.≅ AT&T Comments at 29-30.

But the real reason why competition has not developed as quickly in the residential market is that state regimes of implicit universal service subsidies keep retail rates for residential customers below cost. And in any event, the Commission can easily adopt unbundling rules that accurately take account of the differences between substitutes used to serve large business customers and small mass market customers. GTE=s proposed loop unbundling rule is a perfect example, because it allows the Commission to safeguard incentives for carriers to deploy loop alternatives to businesses and MDUs with more than 20 lines while recognizing that such alternatives are not yet viable for mass market customers. This threshold reflects both engineering and marketplace realities. For traditional wireline CLECs, 20 lines is generally the point where a business customer or MDU can be served by a DS1 line that can readily be dropped from a CLEC SONET ring and provisioned at a much lower cost than 20 separate lines. NECI Report at 34-35. Likewise, fixed wireless networks are ideally suited to serve customers or MDUs requiring DS1 capacity or greater. CLECs operating in the marketplace clearly recognize this distinction, as numerous wireline and fixed wireless CLECs are providing service to business and MDU customers with 20 or more lines using self-provided or wholesale-purchased alternatives to unbundled ILEC loops. *See* GTE Comments at 66, 70. The Commission therefore should not heed AT&T=s request that it bootstrap the availability of elements serving large customers -- for which substitutes are widely in use by highly capitalized CLECs -- on the nascency of facilities-based competition for mass-market customers. Such a rule would not be true to the Court=s instruction that the Commission consider Athe availability of elements outside the

incumbent=s network,≅ *Iowa Utils. Bd.*, 119 S. Ct. at 735, to the text of section 251(d)(2), or to the Act=s procompetitive purpose.

Finally, AT&T, Sprint, and Qwest assert that section 251(c)(3) precludes the Commission from differentiating in its unbundling rules between elements that serve different types of customers. These commenters conclude that section 251(c)(3)=s requirement that ILECs make elements available Ato any requesting carrier for the provision of a telecommunications service≅ precludes the Commission from adopting rules that allow elements Ato be used to provide service to a particular customer group.≅ Sprint Comments at 45.[21] But the rules that GTE proposes to account for differences in geographic markets -- wire centers with 15,000 or more lines for transport and customers with 20 or more lines for loops -- are not based on the kinds of customers served by these elements but on the size of the area or customers served on competitive terms by substitutes. Nothing in the Act precludes the Commission from drawing these common sense distinctions. Moreover, as the Supreme Court confirmed, section 251(c)(3) does not place an independent duty on ILECs to provide unbundled access to every item that meets the definition of network element. Rather, section 251(c)(3) only Aindicates where unbundled access must occur, not which [network] elements must be unbundled.≅ *Iowa Utils. Bd.*, 119 S. Ct. at 736. Section 251(d)(2)=s Anecessary≅ and Aimpair≅ standards do that job, and if the Commission concludes that elements serving business customers or customers of a certain size do not meet these standards, then the Act precludes such elements from being unbundled.

[21] *See also* Qwest Comments at 47 (A[T]he Act does not permit class-of-service limitations on network elements.≅).

D. Access To a AProprietary≅ Feature, Function or Capability of a Network Element Should Be ANecessary≅ Under Section 251(d)(2)(A) Only Where the Proprietary Feature, Function or Capability Is Integral To the Operation of the Element Such That CLECs Cannot Make Use of the Element Without Such Access.

Numerous commenters, including the Big Three, argue that the difference between the Anecessary≅ and Aimpair≅ tests Aultimately is one of degree.≅ AT&T Comments at 55; *see also*, *e.g.*, MCI WorldCom Comments at 16 (ACongress established a higher threshold for access to proprietary elements than for nonproprietary elements, contrasting the necessary standard for the former with the impairment standard for the latter.≅). But this interpretation of Anecessary≅ is not consistent with the most reasonable reading of section 251(d)(2) or with the fact, as recognized by MCI WorldCom, that A[f]ew elements are proprietary or have proprietary aspects.≅ MCI WorldCom Comments at 20. The most reasonable interpretation of section 251(d)(2) must recognize that the Anecessary≅ test should apply to proprietary features, functions or capabilities of network elements, which are themselves defined to be Anetwork elements≅ under the Act. *See* 47 U.S.C. э 153(29). If the proprietary feature or functionality is not integral to the operation of the element of which it is a part -- if a CLEC can make use of the element without access to the proprietary feature or functionality -- then ILECs should not be required to provide access to that aspect of the element. If, on the other hand, the proprietary portion is integral to the operation of an element that otherwise satisfies the Aimpair≅ test such that the element cannot be used without the proprietary feature, function or capability, then access to it is Anecessary≅ and must be provided. This interpretation of section 251(d)(2) is supported by the Competitive Telecommunications Association, which states that access Ato a network element that has a proprietary component is necessary if a

material loss in the functionality of the network element would result without access to its proprietary characteristic and if the requesting carrier=s ability to provide the intended service would otherwise be impaired.≅ Competitive Telecommunications Ass=n Comments at 17 (emphasis omitted).

GTE=s interpretation of section 251(d)(2)=s Anecessary≅ test will ensure that investment expectations in intellectual property are not defeated when there is no need to afford CLECs access to proprietary protocols. Other commenters have proposed two limitations on the scope of the Anecessary≅ test that would undermine this purpose without producing any countervailing competitive benefits. *First*, AT&T and others assert that the protections of section 251(d)(2)=s Anecessary≅ test should extend only to ILEC proprietary protocols and not such protocols owned and licensed by third parties. AT&T Comments at 54-55. But it is vital for the Commission to guarantee that telecommunications equipment vendors -- who, in MCI WorldCom=s words, are responsible for Amost of the innovation and high-risk investment that takes place in the telecommunications industry,≅ MCI WorldCom Comments at 9 -- continue to have strong incentives to innovate. If proprietary protocols belonging to these vendors become public property once licensed to a single ILEC, these drivers of competition will lose their incentive to develop new products.

Second, ATLS and others assert that Aif unbundling merely will give a requesting carrier the benefit of a proprietary methodology, but does not disclose the methodology, the network element is not >proprietary= for the purposes of Section 251(d)(2).≅ ALTS Comments at 16. But much of the return on investment for intellectual property comes from the right to limit the number of parties to whom it is licensed. Although the risk to incentives is lessened if users of the protocol are not able

to copy it, requiring ILECs and third-party vendors to make proprietary protocols available to all comers is fundamentally at odds with the protections that state and federal law afford intellectual property and trade secrets. To assure that all parties in the telecommunications industry continue to have strong incentives to innovate, the Commission should therefore extend the protections of the Anecessary≅ test to *all* proprietary aspects of ILEC elements, regardless of the source or the extent of the disclosure inherent in unbundled use of the elements.

II. THE REAL-WORLD ACTIONS OF CLECs CONFIRM THAT SWITCHING, OPERATOR SERVICES AND DIRECTORY ASSISTANCE, AND SIGNALING, SHOULD NOT BE SUBJECT TO UNBUNDLING.

A. Hundreds of CLECs Currently Self-Supply Their Own Switching in Markets Across the Nation. Switching Therefore Does Not Meet Section 251(d)(2)=s AImpair≅ Test.

Although the Big Three attempt to minimize the scope of CLEC switch deployment over the past three years, actual marketplace facts confirm that CLECs are able to self-provide their own switching in every kind of market. As of March of 1999, CLECs had deployed a total of 724 switches, with *167 different CLECs* placing switches in *320 different cities*. UNE Fact Report at I-1. PNR=s survey of eight typical GTE markets confirms that *every* facilities-based CLEC operating in those areas -- including Mark Twain Communications operating in GTE=s rural Missouri territory -- self-provides its own switching. PNR Report at 23. In these eight markets alone, facilities-based CLECs have deployed 130 of their own switches. *Id.* at 10.

It is therefore not surprising that ALTS -- the organization representing CLECs that have the most to lose if facilities-based competitors are disadvantaged by the Commission=s unbundling rules -- agrees that switching should not be subject to an unbundling obligation. ALTS Comments at ii

(omitting switching from the list of elements ALTS believes should be unbundled). This conclusion is echoed by the comments of individual facilities-based CLECs. Cox Communications -- which has Ainvested over $4 billion in venture capital over the past six years≅ in building its own local facilities -- counsels the Commission that Athe current broad availability of UNEs and the Commission=s pricing methodology actually jeopardize the development of facilities-based competition.≅ Cox Comments at 2, 12. Because overbroad unbundling rules Aprovide significant incentives for new entrants to obtain UNEs from the ILECs rather than considering deployment of competitive facilities,≅ Cox argues for unbundling only a limited number of elements that *does not* include switching. *Id.* at 11-12.

Similarly, Focal Communications -- a facilities-based CLEC that has invested roughly $200 million in local networks that include self-provided switching -- concludes that Arequiring switch-based CLECs to compete with unbundled ILEC switching would be completely inconsistent with the Act=s goal of encouraging facilities-based competition.≅ Focal Comments at 2. Based on its own experience as a Astart-up company with almost no business three years ago,≅ Focal counsels the Commission that CLECs face no Asignificant obstacles to . . . raising the capital to purchase switches.≅ *Id.* at 5.

Likewise, the Ohio PUC, which has conducted an intensive factual review of the alternatives to ILEC switching available in Ohio, concludes that CLECs should not be able to secure unbundled access to ILEC switching. This conclusion is based on the fact -- confirmed by GTE=s own experience in the eight representative markets studied by PNR -- that numerous CLECs are self-providing switching, that CLECs are able to Aserve multiple exchanges, even multiple counties with

a single switch,≅ and that Aswitch vendors are attempting to capitalize on the CLEC switch market by offering smaller scalable switches with significantly lower costs and attractive financing options.≅ Ohio PUC comments at 7-8.

AT&T nevertheless contends that CLECs have deployed Aonly a tiny fraction of the switches that the incumbent LECs have deployed≅ -- a gap that purportedly reflects Athe enormous size of the investment and the long lead times needed to deploy≅ switches and Athe fact that switch-based entry is not an economically viable means to compete for most new customers, especially residential and smaller business customers.≅ AT&T Comments at 89. According to AT&T, CLECs have installed Afewer than 600 switches, and those switches are located largely in selected urban areas with a high concentration of businesses.≅ *Id.* at 91. But the differential in the number of CLEC and ILEC switches generally is a function of ILEC universal service and carrier of last resort obligations. In GTE=s case, rural and non-contiguous service areas in many states set a precedent for the existing network design, a history that CLECs have no need to replicate when they enter the market area.

Moreover, as even MCI WorldCom concedes, ACLECs are employing forward-looking networks that, given such advances as fiber technology, will require far fewer switches.≅ MCI WorldCom Comments at 39. Indeed, MCI WorldCom estimated that, Abased on the latest technology options, the number of switches required to serve the entire country [i]s 4,200 (or only 22% of the current number of total switches).≅ Reply Declaration of Francis J. Murphy at 7 (citation omitted) (AMurphy Reply Declaration≅) (filed herewith as Appendix B). This conclusion is echoed by the California PUC, which states that CLECs Ahave found it advantageous to have their switches

serve a much larger geographic area than LEC switches, and most competitors in California have configured their networks to take advantage of those economies.≅ California PUC Comments at 4. Thus, CLECs like ITC Deltacom are using switches to serve markets as far as 190 miles away -- a distance that can be expanded up to 650 miles by attaching a remote switch to the CLEC=s main switch. UNE Fact Report at I-23. Likewise, Genesis Communications International, which targets ethnic markets, serves customers in California, Oregon, Arizona, and Nevada with a switch placed in Los Angeles. It is also planning to deploy a new switch in Dallas that will serve customers in Texas, Colorado, and New Mexico.[22] AT&T=s apples-to-oranges comparison between the number of CLEC and ILEC switches therefore says nothing about the ability of CLECs to compete successfully using self-provided switching.

Despite the fact that CLECs have had extraordinary success competing in the marketplace using their own switches, the Big Three identify a number of costs CLECs must bear when self-supplying switching. As a preliminary matter, it bears repeating that the Commission should not base its Aimpair≅ determination solely on a cost comparison between CLEC self-provisioning and purchasing unbundled switching from the ILEC. As Professor Kahn explains, such an analysis must take into account *all* the factors relevant to determining whether a firm can remain competitive in the marketplace, including the competitive advantages facilities-based CLECs have -- including efficiencies stemming from newer network equipment and economies of scope derived from CLECs= ability to offer bundled services -- and the competitive disadvantages ILECs face, including diseconomies of scale stemming from obligations to serve all customers in a given territory. *See* Kahn

[22] *Competitive Local Entry -- CLEC,* TRInsight, June 8, 1999 edition.

Reply Declaration at 3; Kahn Declaration at 12. Only if this complete picture establishes that, *on balance*, CLECs are unable to compete effectively without access to an ILEC element would section 251(d)(2)=s Aimpair≅ test be satisfied. The best evidence about the ability of CLECs to compete comes from CLECs= own marketplace behavior, and the marketplace evidence clearly establishes that CLECs are able to compete effectively using their own switching -- whatever additional costs they bear. This fact is proven by AT&T and MCI WorldCom=s own experience operating in the eight GTE markets surveyed by PNR. Collectively, the two carriers have deployed 12 switches in just three of these eight markets -- a substantial investment they surely would not have made if CLECs operating their own switches suffer significant cost disadvantages relative to ILECs. PNR Report at 30, 72.

Even taking the Big Three=s claims individually, it is clear that CLECs self-providing switching actually operate at a cost *advantage*, not disadvantage, relative to ILECs. *First*, AT&T asserts that CLECs self-providing switching must bear the Ainefficiency that would result from having to design and build a network before knowing who the customers are and what their traffic patterns require.≅ AT&T Comments at 94. CLEC design decisions, according to AT&T, are based on Alittle more than guesswork about the location and calling patterns of those customers they are able to win from the incumbent.≅ *Id.* at 97. This claim is patently ridiculous. Facilities-based CLECs, some with market capitalizations exceeding $2 billion, have both the resources and the expertise to plan efficient networks. Indeed, the Big Three and 164 other CLECs have deployed their own switches -- few, if any, were placed based on Alittle more than guesswork.≅ UNE Fact Report at I-1.

Second, AT&T asserts that CLECs cannot economically self-provide switching to provide Amass market services that otherwise depend on elements obtained from LECs.≅ AT&T Comments at 16. But there is no such thing as a Abusiness switch≅ or a Aresidential switch.≅ Switches, once deployed, are capable of serving any kind of customer. Thus, numerous competitors are using self-provided switches to serve residential customers. Many CLECs -- including Cox Communications, Teligent, and WinStar -- are using self-provided switching to supply local service to residential customers located in MDUs. Moreover, in GTE=s rural Missouri, Iowa, and South Carolina territories studied by PNR, CLECs are using self-provided switches to serve Aall residential and business customers,≅ including single-family residences. PNR Report at 65, 67. Thus, as the following table indicates, CLECs are using their own switches to serve residential and business customers even in the smallest suburban and rural markets.

LOCATION	**CLEC**	**MARKET TYPE**	**POPULATION (1990)**
Oviedo, FL	Intermedia	suburban	11,114
Delmar, IA	Farmers & Bus. Tel.	rural	517
Oxford Junct, IA	Lost Nation-Elwood	rural	581
Mackay, ID	Westel	rural	574
Paducah, KY	ALEC	suburban	27,256
Gonzalez, LA	Advanced Tel.	suburban	7,003

Fergus Falls, MN	Otter Tail Telecom.	suburban	12,362
Noborne, MO	Green Hills Telecom.	rural	856
Bloomsburg, PA	Commonwealth	suburban	12,439

Murphy Reply Declaration at 4. There is nothing special about these markets. CLECs have therefore proven themselves quite capable of serving even the smallest customers in every kind of area using self-supplied switching.

Nevertheless, MCI WorldCom echoes AT&T=s claim that CLEC switches cannot be used to serve residential customers, stating that it has chosen to use unbundled switching to provide mass market service in New York even though it has its own switches in place. MCI WorldCom Comments at 53. Rather than demonstrating that switching should not be unbundled, however, this claim demonstrates unequivocally that affording CLECs access to a UNE Platform that includes switching at TELRIC prices destroys incentives to self-provide facilities. MCI WorldCom is offering this mass market service in New York through a UNE Platform made available by Bell Atlantic. While numerous other CLECs are targeting residential MDU customers in New York using their own switching, MCI WorldCom found it advantageous to exploit arbitrage opportunities by relying on the UNE Platform. Thus, notwithstanding the Big Three=s claims that the Platform=s availability will spur deployment of facilities, MCI WorldCom=s limited experience in New York proves that just the opposite is true.

Third, the Big Three argue that it takes Aan average of nine to twelve months≅ to deploy a new switch, while, if CLECs were afforded access to the UNE platform, they Acould begin competing for a large portion of all customers immediately.≅ AT&T Comments at 91-92; *see also* MCI WorldCom Comments at 54. But CLECs already have switches in place that can serve almost the entire United States, and new switches marketed to CLECs by equipment manufacturers can be deployed very quickly. NECI Report at 20 & Attachment D. Lucent, for example, has developed Aprefab central offices≅ specifically to reduce installation time for CLECs -- Athe entire process, from prefab to deployment of service takes 40 days.≅ UNE Fact Report at I-30 (citation omitted). Even assuming that AT&T=s estimate is accurate, the Commission should not expect that facilities will be deployed in every market in the country overnight. It would slow the pace of competition far more if the Commission adopted a rule -- like the UNE Platform requirement proposed by the Big Three -- that allowed *competitors* to enter markets instantaneously but destroyed the prospects that *competition* could develop over the long term.

Fourth, the Big Three argue that CLECs that are self-providing switching must bear the cost of establishing collocation in ILEC central offices and purchasing the equipment required to Aaggregate their traffic and extend the ILEC=s loops to the CLEC=s switch using interoffice transport capabilities.≅ AT&T Comments at 86; *see also* MCI WorldCom Comments at 51. But with respect to collocation, the recent *Advanced Services Order* was designed, in the Commission=s words, to Areduce the costs and delays faced by competitors that seek to collocate equipment in an

incumbent LEC=s central office.≅[23] This order increases significantly the options available to CLECs seeking collocation, guaranteeing CLECs access to Ashared cage and cageless collocation arrangements≅ and requiring ILECs to Apermit collocation in adjacent controlled environmental vaults≅ when Aspace is exhausted at a particular LEC location.≅ *Advanced Services Order* & 6. The *Advanced Services Order* also allows CLECs to collocate all equipment used to facilitate Ainterconnection and/or access to unbundled network elements,≅ affords CLECs to tour central offices in which they have been denied collocation, and requires ILECs to make room in central offices by removing Aobsolete, unused equipment.≅ *Id.* & 8. Moreover, the Commission found that GTE and other ILECs Arespond to physical collocation requests within ten days≅ -- a Areasonable time≅ in the Commission=s estimation -- and that state commissions are Aensur[ing] that collocation is provisioned in a timely manner.≅ *Id.* & 23. The fact that 167 CLECs have successfully deployed their own switches confirms that the need for collocation is not an impediment to self-provision. UNE Fact Report at I-1. To the extent that any problems with collocation have arisen, the *Advanced Services Order* confirms that these problems are best addressed directly -- rather than by making unbundled ILEC elements available unnecessarily and thereby disrupting competition.

Likewise, CLECs are not disadvantaged by the fact that they must Aaggregate their traffic and extend the ILEC=s loops to the CLEC=s switch using interoffice transport capabilities.≅ AT&T

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[23] *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-147, at & 6 (rel. Mar. 31, 1999) (A*Advanced Services Order*≅).

Comments at 86. CLECs are able to serve numerous ILEC rate centers with a single switch, which means that -- on the whole -- the cost of building and operating a CLEC network appears to be lower. And although CLECs must bear the cost of transporting traffic from ILEC central offices back to their switches, ILECs must bear an even higher cost associated with interconnecting a much larger number of switches. Thus, Rochester Telephone, a Frontier subsidiary, working with Lucent Technologies was able to consolidate its base of 24 class-five switches and one class-four switch down to only six 5ESS-2000 switches. This 75 percent consolidation reduced Rochester=s interoffice trunking requirements by 40 percent. Murphy Reply Declaration at 8. As WinStar states in its comments, it is Aable to build highly efficient networks that provide state-of-the-art telecommunications services≅ and Ais not subject to the economic inefficiencies or antiquated technology often associated with ILEC services.≅ WinStar Comments at 3. The marketplace success of CLECs relying on their own switching confirms the accuracy of WinStar=s assessment.

Fifth, the Big Three assert that ACLECs= ability to use their own switches to compete is severely restricted because of their dependence upon the manual >coordinated hot-cut= process that incumbent LECs must perform to transfer each and every former incumbent LEC customer=s loop to a CLEC switch.≅ AT&T Comments at 86-87; *see also* MCI WorldCom Comments at 52. But these alleged difficulties have not stopped CLECs from using self-provided switching to serve high volumes of business and residential customers. Even AT&T argued in another Commission proceeding that the physical process of reconnecting a customer loop to a CLEC switch takes only one minute. *See* Murphy Reply Declaration at 16. Any additional delays associated with hot-cuts stem from the need for *both* ILECs and CLECs to coordinate their staffing and provisioning

processes. GTE, for example, provides hot-cuts on demand to CLECs and schedules them to take place at a mutually agreeable time. *Id.* at 15. GTE performs these hot-cuts when scheduled unless -- as is often the case -- the CLEC asks for a delay. *Id.* at 15-16. This process of CLEC/ILEC coordination is working so well now that Allegiance Telecom -- which self-provides its own switching in each of the markets it serves -- tells Anew customers that making [Allegiance their] local telecommunications provider is almost as easy and seamless as switching long distance carriers.≅ *Id.* at 17 (citation omitted). In AT&T=s own words, Ain the long run a CLEC order for a UNE should be should be no more complex than the average [ILEC] order.≅ *Id.* (citation omitted).

Nevertheless, the Big Three use the purported difficulties associated with the hot-cut process to push the UNE Platform, asserting that CLECs using the Platform could change customers to their service with Aa software change that occurs almost instantaneously.≅ AT&T Comments at 88; *see also* MCI WorldCom Comments at 52. But the Commission must determine the most effective means for guaranteeing facilities-based competition over the long term. Numerous CLECs are relying on their own switching -- and the manual hot-cut process -- to provide both business and residential service. These CLECs will be severely disadvantaged if companies like AT&T and MCI WorldCom -- who clearly have the capital, existing long distance customer bases, and brand recognition to compete with their own facilities -- are able to secure local customers by offering service over a UNE Platform priced at TELRIC. But the only way the hot-cut progress will continue to improve -- and perhaps result in an automated process for switching customer service -- is if competitors and third-party vendors have a continued incentive to develop better solutions. Affording CLECs access to the UNE Platform destroys this incentive by delaying, or eliminating altogether, the need to transition

customers from the ILEC=s network to self-provided CLEC switches. Ultimately, this can only make it much more difficult for facilities-based competition to flourish.

Sixth, AT&T asserts that the Commission should require ILECs to unbundle switching because CLECs cannot Atake advantage of an incumbent LEC=s shared transport element unless the CLEC can also obtain that incumbent LEC=s unbundled switching element.≅ AT&T Comments at 99. The Supreme Court recently reopened the question of whether ILECs must offer unbundled access to shared transport, vacating the Eighth Circuit=s decision approving the Commission=s requirement that shared transport be unbundled. *See Ameritech v. FCC*, 1999 WL 116994 (U.S. June 1, 1999). Since the Commission adopted that requirement, the success of CLECs operating in every kind of market -- and serving every kind of customer -- using their own switches has confirmed that CLECs can compete without access to shared transport. These CLECs do not, as AT&T contends, have to Aprovision direct trunk groups≅ to every ILEC end-office and CLEC switch to achieve ubiquitous coverage of a local service area. AT&T Comments at 109. Instead, CLECs are able to provide ubiquitous service to their customers merely by *interconnecting* with ILEC access tandems -- a practice that is widely observed among CLECs today. *See* Murphy Reply Declaration at 21. CLECs that self-provide switching are therefore readily able -- and do -- secure the *functionality* provided by ILEC shared transport without access to unbundled ILEC switching. Thus, as the Ohio PUC states in its comments, Athe provision of shared transport as a UNE would be rendered academic unless a proper demonstration is made to rebut≅ the case that switching should not be unbundled. Ohio PUC Comments at 11. No such case has been made by AT&T or by any other commenter.

Finally, the Big Three argue that customers served by loops provisioned through integrated digital loop carrier systems cannot be moved over to a CLEC switch through the hot-cut procedure and therefore that, for these customers, Adenial of access to unbundled switching may equate to a denial of an effective competitive choice of providers.≅ AT&T Comments at 105; *see also* MCI WorldCom Comments at 55. But both the Commission and the Big Three have stated that it is Afeasible to unbundle IDLC-delivered loops.≅ *First Report and Order* & 384. Indeed, both AT&T and MCI WorldCom have submitted to regulators papers that Adescribe several practical alternatives for unbundling [IDLC] loops.≅ These alternatives, described in the Murphy Reply Declaration at 13-14, confirm that the Commission should not require ILECs to unbundle switching due to any supposed problems connecting IDLC-served customers with self-provided CLEC switches.

Ultimately, whatever additional costs CLECs face in employing alternatives to ILEC switching, the factual record demonstrates unequivocally that CLECs are competing effectively using their own switches. As many as 167 different CLECs have made the decision to place their own switches in markets that range from Dallas, Texas to Oxford Junction, Iowa. UNE Fact Report at I-1. PNR=s survey of eight typical GTE markets confirmed that *every* facilities-based CLEC operating in those areas self-provides its own switching, and in these eight markets alone, CLECs have deployed 130 of their own switches. These sophisticated and highly capitalized companies would not be spending the resources required to deploy these switches if doing so placed them at a permanent cost disadvantage. The real-world evidence -- and section 251(d)(2)=s Aimpair≅ test -- therefore unequivocally counsels the Commission against requiring ILECs to provide unbundled access to switching.

B. A National Competitive Market Exists For Operator Services and Directory Assistance. Section 251(d)(2)=s AImpair≅ Test Therefore Precludes the Commission From Ordering ILECs To Provide Unbundled Access To These Elements.

As GTE documented in its Comments, numerous CLECs are currently self-providing OS and DA services or are purchasing these services from wholesale providers. Based on this factual record, even Sprint concedes that OS and DA most likely do not satisfy section 251(d)(2)=s Aimpair≅ test. Sprint Comments at 28. ALTS makes the same concession, omitting from its comments any discussion of the need to unbundle OS and DA services. ALTS Comments at ii. The same conclusion is expressly reached by the Ohio PUC, which states that AOS/DA is widely available from non-ILEC carriers such as alternative operator service providers, IXCs, and various CLECs.≅ Ohio PUC Comments at 12. Likewise, the Ohio PUC concludes, based on its extensive review of the OS/DA alternatives in the Ohio marketplace, that Aa majority of CLECs self-provision OS/DA.≅ *Id.* at 12.

Again, despite this overwhelming real-world evidence, AT&T, MCI WorldCom and other commenters argue that the Commission should require ILECs to unbundle OS and DA. AT&T claims that CLECs require access to unbundled ILEC OS/DA because ILECs do not provide Acustomized routing of their local OS/DA traffic≅ from the ILEC switch to the CLEC platform. AT&T Comments at 126; *see also* MCI WorldCom Comments at 71, 73. Even if this were true -- which it is not -- it should have no impact on the Commission=s deliberations. Customized routing is not required by CLECs that provide their own switching. Because switching does not

meet section 251(d)(2)=s Aimpair≅ standard, CLECs should have no need for customized OS and DA routing once the Commission promulgates its new rules.

Moreover, AT&T is simply wrong to assert that ILECs do not provide customized routing. GTE has implemented customized routing to support the delivery of CLEC traffic to third party OS/DA providers or to the CLEC=s own OS/DA platform. Murphy Reply Declaration at 40. GTE also provides customized routing to CLECs who wish to use GTE=s OS/DA services, with or without branding. *Id.* This commitment to customized routing is documented in numerous GTE interconnection agreements. As part of the interconnection negotiation process, GTE provides CLECs with a listing of offices that have been programmed to supply customized routing. *Id.* at 40-41. If a CLEC requests customized routing in an office that is not on the list, GTE will program the capability in that office. *Id.* at 41. CLECs therefore face no operational impediments to self-providing OS and DA services or to purchasing those services from wholesale providers.

Likewise, AT&T asserts that CLECs require access to ILEC emergency and DA databases because substitutes for these databases are inferior in quality. This inferiority stems, according to AT&T, from the fact that alternative providers update their databases less frequently. AT&T Comments at 130-31; *see also* MCI WorldCom Comments at 72. This argument is a red herring. The Commission=s rules already guarantee CLECs access to ILEC databases. Section 251(b)(3) of the Act requires all LECs to provide to any requesting company Anondiscriminatory access to . . . operator services, directory assistance, and directory listings.≅ Pursuant to this

section, the FCC adopted Rule 217, which requires all LECs to Apermit competing providers to have access to and read the information in the LEC=s directory assistance databases.≅ 47 C.F.R. ∋ 51.217. Likewise, Section 222(e) of the Communications Act requires all telecommunications carriers to provide their subscriber information Ato any person upon request for the purpose of publishing directories in any format.≅ There is therefore no need for the Commission to require ILECs to provide unbundled access to their DA databases.

Moreover, AT&T and MCI WorldCom are simply wrong to assert that the quality of wholesale DA database alternatives differs materially from ILEC DA databases. Wholesale DA providers routinely take advantage of their access to ILEC databases and build their own national DA databases by compiling information from numerous ILEC sources. InTeleServ, for example, operates with a DA database that has direct feeds from ILEC DA databases and Ais supported with updates every 24 hours.≅ Murphy Reply Declaration at 38. Even AT&T agrees -- in practice -- that alternative DA providers offer high-quality service. Excell Agent Services, which maintains an Aextremely accurate database≅ by Aconstantly updating and verifying listings,≅ was selected just last month by AT&T to supply its new national DA service. *Id.* at 39 (citation omitted).

Finally, MCI WorldCom asserts that, for ACLECs with very small market penetration, the unit costs of constructing their own OS/DA platforms and of transporting small levels of traffic back to these platforms≅ is prohibitively high. MCI WorldCom Comments at 74. While this assertion may be true, it is irrelevant to the Commission=s decision about whether to require

ILECs to unbundle OS and DA services. Small CLECs have a choice among numerous wholesale OS and DA providers if they want to avoid developing their own platforms, and these providers price their services in packages of as few as 1,000 data listings. UNE Fact Report at IV-5. Given that 16 facilities-based CLECs are already competing in the eight GTE markets studied by PNR using self-provided or wholesale purchased OS and DA services, the Commission has no basis to conclude that CLECs are Aimpaired≅ in their ability to provide service without access to unbundled ILEC OS and DA.

C. Because Numerous CLECs Are Either Building Their Own Signaling Networks or Are Purchasing Signaling Service From Wholesalers, Section 251(d)(2)=s AImpair≅ Test Precludes Signaling From Being Subject To Unbundling.

CLECs seeking alternatives to ILEC-provided signaling likewise have ample alternatives available in the marketplace. Given the widespread availability of signaling hardware and software, in the eight GTE markets studied by PNR alone, 12 CLECs -- including Allegiance Telecom, AT&T, e.spire, Frontier Communications, GST, HTC Communications, and Lost Nation-Elwood Telephone -- have opted to build their own signaling networks. PNR Report at 23. CLECs seeking competitive alternatives to ILEC-provided signaling are also purchasing such services from numerous wholesale providers, including GTE Intelligent Network Services, SNET, Illuminet, BTI Telecom Services, TNSI Telecom Division Services, NaviNet, Revcom, and Targus Information Group. NECI Report at 48-49. These wholesale providers offer CLECs access to *every* signaling functionality provided by ILECs including AIN databases, require CLECs to establish only a single pair of connections to the provider=s network, and offer service at prices accessible to even the smallest CLECs. *Id.* at 49.

The Big Three and other commenters offer little rebuttal to this market evidence. *First,* AT&T claims that when a Anew entrant purchases the local switching element from the incumbent LEC, it must also obtain signaling from the incumbent LEC.≅ AT&T Comments at 110; *see also* MCI WorldCom Comments at 59-60. True enough, but because switching does not itself meet section 251(d)(2)=s Aimpair≅ test, signaling cannot be bootstrapped along with it. Even if the Commission does conclude that switching must be unbundled in some markets,

AT&T=s assertion only justifies affording CLECs access to unbundled signaling when they purchase the two in combination. CLECs that self-provide switching have no need for unbundled ILEC signaling.

Second, MCI WorldCom asserts that Arequiring entrants to bear the cost of deploying a fully redundant network architecture, including AIN databases and their application software, would constitute a significant barrier to market entry.≅ MCI WorldCom Comments at 61. But this claim is belied by the fact that numerous small providers in just the eight GTE markets studied by PNR have found it economical to deploy their own signaling networks. Moreover, the availability of wholesale signaling service to the smallest CLECs makes MCI WorldCom=s assertion irrelevant to the Commission=s Aimpairment≅ analysis.

Finally, ALTS claims that, over Athe past three years, no comparable alternatives have developed for ILEC signaling or call-related databases.≅ ALTS Comments at 58. This assertion -- supported by no citation to actual market facts -- is simply false. Alternatives to ILEC signaling -- both in the form of self-provisioning and wholesale purchase -- are ubiquitous. Signaling therefore does not satisfy section 251(d)(2)=s Aimpair≅ standard.

III. CLECs ARE COMPETING SUCCESSFULLY IN WELL-DEFINED PRODUCT AND GEOGRAPHIC MARKETS USING SUBSTITUTES FOR UNBUNDLED ILEC TRANSPORT AND LOOPS. THE COMMISSION=S RULES MUST TAKE ACCOUNT OF THESE PREVAILING MARKET REALITIES.

A. GTE=s Experience Confirms That CLECs Are Broadly Employing Substitutes For Unbundled ILEC Transport in Wire Centers Serving 15,000 or More Lines. Transport Therefore Should Not Be Subject To an Unbundling Obligation in These Markets.

In markets across the country, CLECs are deploying their own networks to self-provide, or provide to other carriers, interoffice transport capacity. Since 1996, the number of CLECs that have deployed fiber networks has grown from 29 to 60, and the number of metropolitan areas served by this fiber has increased from 130 to 289. UNE Fact Report at II-6. Within the top 50 MSAs, competitors have deployed over 30,000 miles of fiber, and in the MSAs ranked between 51 and 150, CLECs have deployed fiber in all but 15. *Id.* at II-6. Indeed, all but one of the 26 facilities-based CLECs operating in the eight urban, suburban, and rural GTE markets studied by PNR self-provide their own transport. PNR Report at 23. As the Ohio PUC concludes, Adedicated transport is available, in many geographic areas . . . , to CLECs outside [the] ILEC=s network both through other non-incumbent carriers (CAPs, IXCs, and various CLECs) and through self-provisioning.≅ Ohio PUC Comments at 10.

Consistent with their near-complete disregard for these market facts, the Big Three contend that in Athe vast majority of cases in which competitors might need dedicated transport, the ILEC is the only source for that transport.≅ MCI WorldCom Comments at 64.[24] Some of the

[24] *See also* ALTS Comments at 51 (AThe extent to which competitive interoffice transport facilities

statements made by commenters cannot even be squared with their own reports made to the marketplace and the Securities Exchange Commission. Allegiance Telecom, for example, states in its comments that transport is Aobviously essential to a CLEC=s ability to offer service,≅ and that in a Areasonably typical≅ market it must Arely heavily on access to . . . unbundled transport network elements in order to offer competitive local exchange service.≅ Allegiance Comments at 18. Nevertheless, in its November 1998 10Q filing to the SEC, Allegiance told investors that Athe company believes that in most of the markets it plans to enter there are multiple carriers in addition to the ILEC from which it could lease trunking capacity; typically at lower prices than the ILEC price.≅ PNR Report at 24 (citation omitted). The two statements made by Allegiance are flatly inconsistent. The Commission should be far more trusting in the accuracy of statements made to the SEC given that a misleading statement in that arena risks criminal charges.

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have been built is still negligible.≅); Covad Comments at 46 (ACovad has a choice of multiple fiber CLECs for interoffice transport in less than 7% of its point-to-point interoffice links.≅).

Despite the widespread use and availability of these transport alternatives in many markets, the Big Three contend that CLECs employing these substitutes face a number of disadvantages. *First*, AT&T laments the fact that there is no Aassurance≅ that wholesale providers Awill continue leasing capacity to other carriers, especially as demand for their own local services increases.≅ AT&T Comments at 122-23. This assertion is nothing more than an indictment of competition itself and the uncertainty created by the possibility that firms will alter their business strategies in a free and open market. Taken to its logical extreme, AT&T=s concern justifies bringing the Aassurance≅ of regulation to all competitive markets -- a result the Act expressly forbids. Moreover, AT&T=s claim ignores the fact that numerous wholesale providers market themselves exclusively as Acarriers= carriers≅ -- offering no retail services of their own to compete for transport capacity. Moreover, wholesale providers have no incentive to cease offering transport capacity to CLEC customers. The majority of these providers offer service over SONET rings whose capacity can readily be increased by adding electronics or employing wave division multiplexing. NECI Report at 25. AT&T=s own affiants concede as much, agreeing that once Afiber has been deployed, adding substantial capacity may be achieved through a simple change out of electronics.≅[25] Because wholesale networks are scalable, there is no reason for the Commission to fear the supply of transport capacity will dry up.

[25] Affidavit of William S. Beans, Jr., Meredith R. Harris, and M. Joseph Stith on Behalf of AT&T Corp., at 5 n.3 (attached as Exhibit A to AT&T=s Comments).

Second, AT&T argues that self-provisioning transport involves a number of Asubstantial costs,≅ including: A(i) negotiating and litigating right-of-way agreements with local municipalities and other parties; (ii) paying the fees imposed by such agreements; (iii) leasing and preparing collocation space; and (iv) acquiring and deploying dedicated transport equipment.≅ AT&T Comments at 111-12. The question of collocation was addressed above, and the ubiquity of CLEC fiber networks demonstrates unequivocally that the cost of Aacquiring and deploying dedicated transport equipment≅ does not in any way Aimpair≅ CLECs from building ubiquitous transport networks. Nor have any difficulties negotiating right-of-way agreements kept CLECs from deploying 30,000 miles of fiber in the top 50 MSAs alone. UNE Fact Report at II-6. Indeed, AT&T itself has stated that claims of excessive right-of-way costs are Aridiculous and totally unsupported.≅ Murphy Reply Declaration at 32-33 (citation omitted). To the extent that CLECs do face costs associated with Anegotiating and litigating≅ municipal right-of-way agreements, those costs fall on ILECs as well. A number of municipalities have attempted to require *all* carriers to pay excessive fees in exchange for access to rights-of-way. In Dallas, for example, the city passed ordinances requiring *both GTE and AT&T* to pay four percent of their gross receipts collected on all services provided in the city -- whether those services used the rights-of-way or not -- in return for access to the streets.[26] But these incidents of municipal overreaching do not justify requiring ILECs to provide unbundled access to interoffice transport.

[26] *See AT&T Communications of the Southwest, Inc. v. City of Dallas*, 8 F. Supp.2d 582, 586 (N.D. Tex. 1998).

Rather, the Commission should address the problem head-on by confirming that the Act limits the ability of municipal governments to charge excessive fees and impose onerous franchise requirements on *all* carriers. Numerous courts have already adopted this approach -- invalidating overbroad municipal regulations and fees by enforcing section 253's limits on municipal authority.[27]

[27] *See, e.g., Bell Atlantic-Maryland, Inc. v. Prince George=s County,* No. CCB-98-4187, Memorandum, at 21-22 (D. Md. May 24, 1999); *AT&T Communications of the Southwest, Inc. v. City of Dallas,* No. 3:98-CV-0003-R, Judgment, at 1-2 (N.D. Tex. May 17, 1999); *AT&T Communications of the Southwest, Inc. v. City of Austin,* 975 F. Supp. 928, 938 (W.D. Tex. 1997).

Third, AT&T claims that dedicated transport made available through ILEC special access tariffs is not a substitute for unbundled ILEC transport because an ILEC cannot avoid Aunbundling obligations by offering unbundled elements to end users as retail services.≅ AT&T Comments at 124. But it would make no sense for the Commission to exclude consideration of substitutes to unbundled ILEC elements like special access when those substitutes are widely used in the marketplace. In such circumstances, there is no basis for AT&T=s concern (echoed by the Commission in the *First Report and Order*) that ILECs Acould completely avoid section 251(c)(3)=s unbundling obligations by offering unbundled elements≅ at tariffed rates. *First Report and Order* & 287. The Commission should not consider special access a viable substitute for unbundled ILEC transport merely because it is offered, but because it is offered *on terms that allow CLECs to compete.*[28] So long as the Commission applies the same Aimpair≅ test to alternatives available from the ILEC as from outside sources, there is no risk that ILECs could circumvent their statutory obligations.

AT&T also claims that ILEC special access is not an effective substitute because prices are Anot cost-based and are not subject to competitive pricing discipline.≅ AT&T Comments at 124; *see also* Covad Comments at 47-48 (arguing that special access prices exceed TELRIC

[28] *See, e.g., City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 647 (10th Cir. 1992) (court must consider alternative products supplied by the owner of a claimed essential facility when determining whether competitors have viable alternatives to that facility), *overruled on other grounds*, *Systemcase, Inc. v. Wang Laboratories, Inc.*, 117 F.3d 1137 (10th Cir. 1997).

prices for transport). But the marketplace reality is just the opposite. ILECs and CLECs generally share in the cost of interconnection facilities that are provisioned for the mutual exchange of local, EAS, intraLATA toll, and jointly provided IXC traffic. For the mutual exchange of local, EAS, and intraLATA toll traffic, GTE reduces the charges for special access facilities ordered by CLECs in a number of ways, often discounting the special access price by 50 percent. Murphy Reply Declaration at 28. In addition to these substantial discounts, many CLECs also qualify for additional price reductions based on traffic volume or the terms of their contracts. *Id.* Moreover, larger CLECs such as AT&T also qualify for implicit volume discounts due to their ability to support higher bandwidth (DS3 and SONET) services because the per unit price of SONET services is typically much lower than the DS1 tariffed rate. *Id.* GTE also allows carriers to purchase large bandwidth pipes (*e.g.*, OC-48 SONET service) and manage the assignment of multiple services (switched access, special access, interconnection trunks, UNEs) that will ride the SONET network to their POP. *Id.* Thus, if a CLEC has sufficient access demand to support the lease of an OC-48 access facility, it can dedicate vacant channels to new access or other types of services. *Id.* CLECs with spare capacity physically can and in practice do provision interconnection trunk groups at no additional cost.

Thus, there are at least five means by which CLECs can obtain dedicated transport capacity. In addition to self-provisioning, third-party alternatives, and ordinary purchases out of ILEC access tariffs, CLECs also can obtain dedicated transport from expanded interconnection arrangements where ILECs share the facilities cost (based on facilities used) and from volume or term discounts applied to the purchase of DS3 and SONET services.

Finally, MCI WorldCom argues that there Ais no single threshold above which dedicated transport is cost-effective.≅ This *assertion* cannot be squared with the econometric study conducted by GTE to identify the wire center characteristics that motivate a CLEC=s decision to collocate. *See* Declaration of Dr. R. Dean Foreman at 2-4 (filed as Appendix C to GTE=s Comments). Dr. Foreman=s analysis estimates the impact of numerous factors on the incidence of CLEC collocation, including access line and interoffice trunk density, wire center size, customer mix, the extent to which an area is urbanized, and ILEC network topology. *Id.* at 2-4. Based on the results of a logistic regression, Dr. Foreman concludes that Acollocation is nearly 18 to 20 times more likely to be observed among wire centers of 15,000 or more lines than in any wire center of smaller size.≅ *Id.* at 7. Because collocation has an extremely strong correlation with the presence of transport alternatives -- as confirmed by the fact that only one CLEC has requested unbundled transport in the 141 GTE wire centers with operational collocation -- GTE=s experience establishes a clear threshold for determining where transport alternatives could economically be used by CLECs. *Id.* at 7. In these markets, section 251(d)(2)=s Aimpair≅ test precludes the Commission from requiring ILECs to provide unbundled access to transport.

B. CLECs Are Self-Providing, or Purchasing From Wholesalers, Myriad ILEC-Loop Alternatives To Serve Large Business Customers and Multiple Dwelling Units. Section 251(d)(2)=s AImpair≅ Test Therefore Precludes These Loops From Being Unbundled.

Notwithstanding the Big Three=s contention that local Aloops are the quintessential bottleneck network elements,≅[29] numerous CLECs are self-providing or purchasing from wholesalers local loops that serve businesses and MDUs with more than 20 lines. Indeed, in the three years since the Act was passed, CLECs have attracted approximately *2.5 million* facilities-based lines to their new networks in GTE and RBOC service territories. As Chairman Kennard stated to the Senate Commerce Committee, Aalmost a million CLEC access lines were installed≅ in the first quarter of 1999 *alone*.[30]

Nevertheless, AT&T and others argue that the Commission should require unbundled access to all loops because self-provision is Aprohibitively expensive≅ and Ais very slow.≅ AT&T Comments at 63.[31] Delays typically stem, according to AT&T, from the need for CLECs to negotiate right-of-way agreements with both municipalities and utility companies and from the time typically required to deploy new facilities. AT&T Comments at 63-66. These arguments

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[29] AT&T Comments at 59; *see also* MCI WorldCom Comments at 43 (for Athe overwhelming majority of customers, the underlying economies of scale of the loop render it a natural monopoly≅); Sprint Comments at 29 (AThere is simply no ubiquitous alternative source of loop plant today.≅).

[30] Oral Testimony of William E. Kennard Before the Senate Commerce Committee, at 2 (May 26, 1999).

[31] Simultaneous with its claim that CLECs Awould clearly be impaired≅ without access to unbundled ILEC loops, Qwest has, in concert with venture capital firms, just sunk one quarter of a billion dollars into a loop alternative and committed to rapid expansion plans in 40 of the top 50 metropolitan markets. *Compare* Qwest Comments at 59 *with* Stephanie Gates, *Qwest and VCs buy into Advanced Radio Telecom*, Redherring.com, June 3, 1999. Qwest=s viability therefore does not, as it suggests, hang in the balance on whether CLECs are afforded unbundled access to ILEC loops in major metropolitan areas.

are little more than repeats of AT&T=s claims about why CLECs could not self-provide transport. Accordingly, they are dealt with above.

AT&T likewise claims that fixed wireless is not an effective loop substitute because it Aconstitutes a minuscule portion of total traffic volumes in the United States≅ and can take as long as two years to deploy in new markets. AT&T Comments at 69-70. This claim is belied by AT&T=s acquisition of TCG, through which it secured 38-Ghz licenses in 213 geographic regions and 95 out of the 100 largest markets. UNE Fact Report at II-17. These licenses were touted as allowing AT&T to serve Acustomers that cannot be served economically with fiber optics.≅ *Id.* at II-17. Moreover, CLECs that predominantly offer service over wireless local loops are experiencing explosive revenue growth and high rates of customer acquisition. Teligent, for example, already serves 28 markets that comprise more than 464 cities and towns with a combined population exceeding 83 million, and is planning to offer service in 12 more markets just in the remainder of 1999. PNR Report at 85. As confirmed by the fact that Teligent, and its sister CLEC WinStar, have a combined market capitalization in excess of $3 billion, CLECs supplying service over wireless local loops are viable -- indeed formidable -- competitors in the local marketplace. As WinStar concludes in its comments, Athe fixed wireless local loop (such as is being deployed by WinStar, Teligent, OpTel, ART, NextLink, and various successful LMDS bidders) is capable at once of breaking the last mile bottleneck≅ and bringing local service Ato a greatly expanded universe≅ of small business and residential customers. WinStar Comments

at 4. Indeed, another CLEC, Triton Network Systems, is advertising that an investment in a fixed wireless network connecting 87 buildings will generate a 25 percent rate of return over 10 years.[32]

Finally, AT&T asserts that the Commission should require ILECs to build loops on demand by CLECs Ato serve customers to whom the incumbent has not yet extended its facilities.≅ AT&T Comments at 82. Thus, according to AT&T, if a CLEC customer located in a new building wants to continue to purchase service from the CLEC, the Commission should require the ILEC to build a loop to that building *just so the CLEC can use it to serve its customer*. *Id.* at 82. But developers routinely seek competitive bids from ILECs *and* CLECs to provide service to new businesses and residential tracts, and GTE frequently has lost out to CLECs in such competitions. ILECs have no inherent advantage over CLECs in providing service to new developments, and therefore any loop facilities put in place to serve new developments are not critical to CLECs= ability to compete. There is therefore no rational basis for distinguishing ILEC and CLEC facilities in this context. Murphy Reply Declaration at 36.

Ultimately, the Big Three and other commenters have done nothing to rebut GTE=s factual presentation that numerous CLECs are using their own wireline and fixed wireless loops to serve business and MDU customers with more than 20 lines. Likewise, the Big Three have not offered the Commission any reason to press ILECs into service building new loops for CLECs when CLECs have proven themselves quite capable of deploying their own facilities. The Commission should therefore conclude that CLECs are not Aimpaired≅ within the meaning

[32] Triton Network Systems Advertisement, USA Today, June 8, 1999, at 8B.

of section 251(d)(2) without access to unbundled ILEC loops serving customers with 20 or more lines, and without access to ILEC-built loops serving new commercial and residential developments.

IV. THE RECORD CONFIRMS THAT CLECs REQUIRE ACCESS TO ILEC OPERATIONS SUPPORT SYSTEMS ONLY WHEN CLECs PURCHASE ILEC UNEs OR RESOLD SERVICES.

There is general agreement among the commenters that CLECs require access to ILEC operations supports systems only when they use ILEC network elements or resold services. For example, Level 3 states that operations support systems Acomprise the mechanisms by which competitive LECs obtain pre-ordering, ordering, provisioning, maintenance and repair, and billing functions *associated with obtaining UNEs and services from incumbent LECs*.≅ Level 3 Communications Comments at 16 (emphasis added). Similarly, AT&T confirms that A[a]ccess to OSS is complementary to all other unbundled network elements.≅ AT&T Comments at 134; *see also* NorthPoint Comments at 20.

No commenter has suggested that CLECs require access to ILEC OSS when they do not use any ILEC facilities or services. As GTE explained in its Comments, there is a competitive market for CLEC internal OSS, so access to ILEC OSS for the purpose of storing information is unnecessary.[33] Therefore, the Commission should only require ILECs to unbundle OSS where the CLEC uses ILEC UNEs or resold services.

[33] GTE Comments at 71-72.

_ On a different issue, ALTS argues Athat the Commission should affirm and clarify that nondiscriminatory access to loop information regarding physical specifications, including loop type, length, conditioning and electronics already in place, is required,≅ and that CLECs should have access to any electronic systems the ILEC has that provide loop qualification information. ALTS Comments at 60-61. However, many ILECs, including GTE, do not have these types of systems. In addition, even when there are loop inventory systems, they are not 100 percent accurate. To meet its nondiscrimination obligation, an ILEC can only be required to provide CLECs with the same access to information as the ILEC itself uses. To the extent that ILECs engage in a manual physical inspection of loops to determine qualification information, CLECs have no right to demand the use of any electronic process.

V. NO ADDITIONAL UNEs MEET THE SECTION 251(d)(2) STANDARD.

In the Notice of Proposed Rulemaking, the Commission asked whether certain equipment and facilities beyond those originally identified in Rule 319 should be unbundled. As GTE showed in its Comments, none of the facilities cited by the Commission satisfies the Act=s requirements. Some are not even network elements and all fail to meet the Aimpair≅ standard in section 251(d)(2). Although numerous CLECs advocate a broad expansion of the UNE Alist,≅ these requests are entirely inconsistent with the Act=s requirements and sound competition policy.

A. The Comments Confirm that ILECs Have No Legacy Advantage in the Deployment of Advanced Services Network Elements.

In its Comments, GTE demonstrated that ILECs are not dominant in the advanced services market and that cable companies and CLECs lead ILECs by a wide margin in the deployment of these services. Advanced services equipment is readily available in the marketplace from major manufacturers, and, in fact, CLECs have purchased more of this equipment than ILECs have. DSLAMs and packet switches are scalable and cost-effective, making them easily within reach of large and small CLECs. The fact that advanced services are provided in a new market with no dominant incumbent, combined with the wide availability of advanced services equipment, demonstrates conclusively that CLECs are not impaired in their ability to offer these services without access to ILEC equipment. GTE Comments at 74-80.

_ The recognition that CLECs do not need access to ILEC advanced services equipment is shared by non-ILEC commenters. For example, the Information Technology Industry Council (AITIC≅) confirms that AILECs have no legacy advantage with respect to the installation and use of advanced services electronics such as Digital Subscriber Line Access Multiplexers (>DSLAMs=).≅ ITIC Comments at 6. ITIC also agrees that Athe ILECs= competitors can acquire and install equipment for advanced services on a relatively equal footing with the ILECs. The relevant electronic equipment is produced by numerous vendors, establishing a competitive equipment market that can effectively discipline prices, provisioning, and other service terms for the foreseeable future.≅ *Id.* at 7. Likewise, WinStar acknowledges that fixed wireless technology

-- widely deployed by CLECs -- is better suited than the embedded wireline network to provide advanced services. WinStar Comments at 4.

Even CLECs acknowledge that advanced services equipment is available in the open market from a variety of commercial vendors. For example, Rhythms NetConnections admits that:

> There are various other elements however, that while important to the provision of competitive telecommunications services, including advanced services, probably do not satisfy the necessary and impair standard. For example, because they can be self-supplied digital subscriber line access multiplexers (ADSLAMs≅) need not, with a few limited exceptions, be provided on an unbundled basis. Likewise, switching may now be sufficiently available on wholesale basis, for many if not most applications, that it may not be necessary to require incumbent LECs to provide this functionality on an unbundled basis.

Rhythms NetConnections Comments at 12. NorthPoint, another major player in the advanced services market, also concludes that A[w]here competitive LECs enjoy access to loops and collocation, any competitive LEC can provide the necessary infrastructure (DSLAMs and packet switches) required to provide advanced services.≅ NorthPoint Communications Comments at 18.

Against this background, there is no basis to the claims of parties such as Sprint, CompTel, and e.spire that advanced services elements, including DSLAMs and packet switching, should be unbundled.[34] Advanced services equipment is available to ILECs and CLECs on the same commercial terms. Under no reasonable definition of the Anecessary≅ and Aimpair≅

[34] Sprint Comments at 35; Competitive Telecommunications Association Comments at 38 (ACompTel Comments≅); e.spire Communications and Intermedia Communication Comments at 31-32 (Ae.spire *et al.* Comments≅).

standard will CLECs suffer without access to these elements.[35] In fact, no commenter has provided any evidence that this equipment is available to CLECs on less favorable terms than it is to ILECs or that CLECs are impaired in the deployment of advanced services without access to ILEC equipment.[36] In addition, as GTE explained in its Comments, requiring ILECs to unbundle advanced services equipment would reduce the incentive of both ILECs and CLECs to invest in these new services. GTE Comments at 79-80.

_ Some parties nonetheless argue that where loops and collocation are unavailable, CLECs cannot provide advanced services to customers without access to the ILEC=s advanced services equipment.[37] However, it is unlikely that this situation will ever occur. First, in every case in which it is technically feasible, GTE provides access to conditioned loops in those central offices

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[35] Some commenters attempt to avoid the required section 251(d)(2) Aimpair≅ analysis by claiming that the loop should be defined to include all transmission-enhancing equipment attached to the loop, such as DSLAMs and multiplexing equipment. *See* MCI WorldCom Comments at 45; AT&T Comments at 78; CompTel Comments at 32. DSLAMs and other equipment attached to the loop, however, are not part of the Araw material≅ loop facility. For example, a DSLAM is deployed together with a conditioned loop in order to produce xDSL service. Each element must meet the Aimpair≅ standard; an element that does not meet the standard cannot be Abootstrapped≅ to another so that CLECs can claim access to both.

[36] e.spire suggests that ILECs be required to provide CLECs with connectivity between ports on data switches at 8, 16, 32, 56, and 64 kbps, every increment of 56 or 64 kbps through 1.544 Mbps, and at intermediate increments through the DS3 level. e.spire *et al.* Comments at 31-32. Since CLECs can acquire, and have acquired, packet switches on the same terms as ILECs, CLECs do not need access to ILEC switches and or connectivity between ports. Even if CLECs were entitled to such connectivity, they would not be entitled to custom order every possible speed and increment of transport. *See also* NorthPoint Comments at 18-19 (requesting a CLEC-specified amount of capacity between the DSLAM and the CLEC=s network).

[37] *See, e.g.,* Rhythms NetConnections Comments at 12; NorthPoint Communications Comments at 18-19.

in which it provides conditioned loops for itself. Second, even in those areas where it does not offer advanced services, GTE will provide conditioned loops to CLECs via a *bona fide* request process.[38] Third, the Commission=s recently adopted collocation rules, though overly intrusive, guarantee that CLECs will be able to collocate advanced services equipment in or immediately next to ILEC central offices (or, failing that, to take advantage of virtual collocation).

[38] In its Comments, GTE stated that it provided access to conditioned loops via tariff in those areas in which GTE does not condition loops for its own use. Although GTE may tariff this offering in the future if it receives a large volume of requests, it currently offers conditioned loops through a *bona fide* request process.

Finally, a number of parties argue that when DLCs are used, there is often insufficient collocation space so CLECs must have access to ILEC DSLAMs and packet switches.[39] However, alternatives to unbundling ILEC equipment do exist. GTE does not use DLCs integrated with DSLAMs, but instead has chosen an architecture in which remotely located DSLAMs are situated separate from, but adjacent to, the DLC. This option is available to CLECs on a *bona fide* request basis and allows them to provide advanced services in the same way as GTE, without accessing GTE DSLAMs and packet switches.[40] When a CLEC remotely deploys a DSLAM in this manner, there are tariffed special access options available to the CLEC to connect its equipment to its switch.

[39] *See, e. g.*, MCI WorldCom Comments at 55; Rhythms NetConnections Comments at 12-13, 16; NorthPoint Comments at 18-19; Covad Comments at 39-41.

[40] CLECs also always have the option of purchasing ADSL as a service through GTE=s interstate access tariff.

B. Dark Fiber Does Not Meet the Definition of an Unbundled Element, But, Even if it Did, it is Readily Available in the Marketplace.

1. No Commenter Has Shown that Dark Fiber Meets the Definition of a Network Element.

The Act defines a Anetwork element≅ as a Afacility or equipment used in the provision of a telecommunications service.≅ 47 U.S.C. ∋ 153(29). Because dark fiber, by its nature, is not and cannot be used to provide any service, it does not meet this definition. Claims to the contrary cannot withstand scrutiny.

_ For example, the Iowa Utilities Board states (without supporting arguments) that dark fiber meets the definition of a network element, but concedes that Ait is a stretch to label it a loop or a trunk while it is unlit.≅ Iowa Utils. Bd. Comments at 9. For this very reason, however, dark fiber is not a network element. Until dark fiber is used in some way, it does not meet the statutory definition. Similarly, ALTS asserts that A[u]nlit or dark fiber is clearly the type of equipment that can be used in provisioning a telecommunications service. Otherwise, ILECs would not own it and CLECs would not want unbundled access to it.≅ ALTS Comments at 56. This argument, however, subtly alters the definition of network element -- from Ais used≅ to Acan be used≅ -- in a manner that dramatically and improperly expands the scope of potential unbundling. Moreover, many things owned by ILECs, from office buildings to paper clips, might be helpful to CLECs, but that does not make them network elements. Finally, although the Texas PUC claims that dark fiber is no different than the unused wires within a telephone cable, this is not the case. Copper cables and fiber optic cables are deployed in fundamentally different ways.

Copper cable is installed to provide optimum flexibility. For example, a 600-pair cable may have 100 vacant pairs at any point in time. Although some pairs may be idle at one particular moment, all pairs are used to provide service. In contrast, dark fiber is unused inventory. These fibers remain dark until they are needed. They are not used in a mix-and-match fashion in the same way as copper feeder and distribution pairs. Since dark fiber is not used to provide service, it does not meet the statutory definition.[41]

2. In Any Event, Because There is Ample Dark Fiber Available in the Market, No Impairment Finding Can Be Made.

Even if dark fiber were a network element, it would not meet the section 251(d)(2) standard. Numerous commenters have shown that dark fiber is readily available in the marketplace from both telecommunications carriers and independent companies. In its Comments, GTE explained that many firms, including GST and Metropolitan Fiber Networks (AMFN≅), have installed extensive fiber networks and lease their excess capacity. GTE Comments at 82-84. Indeed, MFN states in its comments that A[u]pon completion, MFN=s network is expected to consist of approximately 1.1 million fiber miles covering approximately

[41] CO Space Services notes that some federal courts have determined that dark fiber meets the definition of a network element. CO Space Services Comments at 2-3. However, at least one federal court has determined that dark fiber does not meet the statutory definition. *See MCI Telecommunications Corp., v. Pacific Bell*, 1998 U.S. Dist. LEXIS 17556 (N.D. Cal. Sept. 29, 1998). GTE submits that the cases cited by CO Space Services were wrongly decided; in any event, they do not bind the Commission.

8,930 route miles.≅ MFN Comments at 2. Notably, these networks include both transport and loop fiber. Likewise, UTC states that utilities have installed over 750,000 fiber miles. UTC Comments at 3. In a survey of UTC=s over 1,000 members, 19 percent of those responding stated that they leased dark fiber to third parties. *Id.*

Despite the substantial evidence that dark fiber is readily available, Qwest claims that A[i]t is clear that without access to dark fiber, competitors would be impaired in their ability to provide advanced services. The deployment of fiber optic facilities imposes substantial costs, delays, and difficulties on competitors.≅ Qwest Comments at 89. However, Qwest provides no evidence that dark fiber is not available in the market. Indeed, Qwest acknowledges that it leases the excess capacity on its inter-city fiber network to other carriers and gives no reason why CLECs with local fiber would not do the same.

Choice One and other CLECs assert that Adark fiber is not available from third parties in the small portions of capacity that many competitive LECs would need to provide service.≅[42] However, it is GTE=s experience that fiber is available in both small and large amounts. Therefore, CLECs of all sizes should not be impaired in any way without access to ILEC fiber.

CO Space claims that ILEC transport is not an adequate substitute for dark fiber because ILECs use the SONET protocol while CO Space customers use the Fiber Channel protocol. CO

[42] Choice One, Network Plus, GST Telecom, CTSI, and Hyperion Comments at 25 (AChoice One *et al.* Comments≅).

Space Services Comments at 9-10. However, CO Space can purchase special access from the ILEC or buy fiber transport from alternative providers, such as MFN. Thus, it is not impaired by lack of access to dark fiber. In addition, CO Space asserts that transport includes unneeded services, which raise the costs to CLECs. *Id.* This is not the case. ILEC transport offerings are reasonably priced and, as the Supreme Court noted, a small increase in cost (assuming there is any difference between transport rates and cost-based dark fiber rates) does not Aimpair≅ CLECs from competing in the market.

CO Space=s request that the Commission require ILECs to install dark fiber on behalf of CLECs is unsupported by the Act and inconsistent with sound policy. *Id.* at 16. First, ILECs are required under section 251(c) to provide CLECs with access to existing network elements; the Act simply does not compel ILECs to act as construction companies for CLECs. Such a requirement would also be in direct conflict with the Eighth Circuit=s determination regarding better-than-parity services. Second, ILECs have no advantage *vis-à-vis* other carriers or firms in the deployment of dark fiber. If GTE had such advantages, it would not lease fiber but would always install its own facilities. As Qwest acknowledged in its comments, GTE does in fact lease fiber from other sources. Qwest Comments at 90. Third, forcing ILECs to construct facilities at every CLEC=s whim would require ILECs to invest huge amounts of resources in accommodating CLEC requests rather than serving ILEC customers. This would give CLECs

a significant, unjustified advantage over ILECs and would not be consistent with promoting fair competition.[43]

Finally, forcing ILECs to unbundle dark fiber would make it more difficult for them to meet their carrier-of-last-resort obligations and discourage long-term planning. ILECs are required to provide service to all customers in their franchise areas within a reasonable time. Compelled unbundling of dark fiber thus could jeopardize service to consumers and undermine the express objectives of section 254.

C. The Act Does Not Require an ILEC To Provide CLECs with Combinations of Elements that it Does Not Provide for Itself or its Customers.

1. The Eighth Circuit=s Determinations Regarding Combinations and Better-Than-Parity Service Are Correct and Are Still Controlling.

ILECs are not required to provide CLECs with combinations of UNEs that they do not provide to themselves or their customers. Section 251(c)(3) clearly states that CLECs must combine unbundled elements and the Eighth Circuit confirmed this conclusion:

> As the Eighth Circuit noted, Athe plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves.≅ *Iowa Utils. Bd. v. F.C.C.*, 120 F.3d 753,813 (8th Cir. 1997). The Commission did not appeal that ruling and the Supreme Court=s decision in *Iowa Utilities Board* did not

[43] MFN requests that the Commission require ILECs to provide Competitive Alternate Transport Terminal (ACATT≅) connectivity. MFN Comments at 7. Although GTE agrees that CATT connectivity may prove to have benefits, there is no basis in the Act upon which require it. CATT is not a UNE, a form of interconnection, or a method of collocation.

affect the Eighth Circuit=s determination. While the Court stated that ILECs may not disassemble elements that already are combined, it neither expressly nor implicitly suggested that ILECs have an affirmative duty to combine unbundled network elements at a CLEC=s behest. *Iowa Utils. Bd.*, 119 S. Ct. at 736-38.[44]

[44] GTE Comments at 84.

In addition, section 251(c)(3) does not compel an ILEC to provide better service to CLECs than it provides to itself. This interpretation was also confirmed by the Eighth Circuit=s decision and left undisturbed by the Supreme Court.[45]

ALTS nonetheless claims that the Supreme Court=s reinstatement of Rule 315(b) allows the Commission to require that AILECs provide UNEs in any technically feasible combination.≅ ALTS Comments at 80. Specifically, ALTS argues that the Supreme Court=s rejection of the Eighth Circuit=s reasoning on Rule 315(b) Asuggests≅ that the Eighth Circuit also erred in vacating Rules 315(c)-(f) and that the Supreme Court did not reinstate those rules only because they were not on appeal. *Id.* After noting that the Commission and other parties have requested that the Eighth Circuit remand or reinstate those Rules and that this request is still pending, *id.*, ALTS somehow concludes that the Commission should ignore the Eighth Circuit=s holding and require ILECs to combine UNEs in any technically feasible combination.

ALTS essentially asks the Commission to violate the law. First, the fact that the Eighth Circuit=s invalidation of Rules 315(c)-(f) was not appealed means that the Eighth Circuit=s decision is still good law. The Commission chose not to appeal those rules. That choice does not then confer on the Commission or any CLEC the right to ignore the Eighth Circuit=s decision. Second, and in any event, the reinstatement of Rule 315(b) in no way suggests that the

[45] *Iowa Utils. Bd. v. F.C.C.*, 120 F.3d 753, 813 (8th Cir. 1997), *aff=d in part and rev=d in part on other grounds, AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

Eighth Circuit=s holding regarding Rules 315(c)-(f) was incorrect. Those rules required ILECs to combine UNEs for CLECs, even though section 251(c)(3) clearly states that ILECs shall provide UNEs Ain a manner that *allows requesting carriers* to combine such elements.≅ 47 U.S.C. ∋ 251(c)(3) (emphasis added). In contrast, Rule 315(b) simply requires ILECs to leave elements that are already combined as they are. Therefore, the Commission has no authority to readopt Rules 315(c)-(f).

AT&T uses similarly misguided arguments to support its conclusion that the Commission must reinstate Rules 315(c)-(f). AT&T Comments at 136. AT&T contends that the Eighth Circuit supported its invalidation of Rules 315(b) and 315(c)-(f) with the same Athree interrelated grounds that have all been fatally undermined≅ by the Supreme Court=s decision Aand other subsequent events.≅ *Id.* at 138. There is no basis for this claim.

The first ground cited by AT&T is the Supreme Court=s determination that the Eighth Circuit used too restrictive a standard of review. AT&T states that:

> had it [the Eighth Circuit] recognized the Commission=s general rulemaking authority under Section 201(b) and applied the standard of review employed in *Southwestern Cable* and other pertinent cases, it would have asked whether the Commission=s rules requiring incumbent LECs to combine network elements reasonably implemented the Act=s objectives and were not inconsistent with the Act=s terms B a standard of review under which the rules would have easily been upheld.[46]

[46] AT&T Comments at 140.

This is not the case. As explained above, section 251(c)(3) specifically requires that CLECs combine elements themselves B no Ainterpretation≅ of the Act is necessary. As the Supreme Court stated in *Chevron*, when interpreting legislation A[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.≅[47] Thus, the standard of review is irrelevant; Rules 315(c)-(f) are inconsistent with the Act.

AT&T further argues that the Commission can ignore the Eighth Circuit=s decision because Athe Supreme Court reinstated Rule 315(b) on the ground that >unbundling= was a pricing term, not a requirement of physical separation, and held that the rule was >entirely rational, finding its basis in ∋ 251(c)(3)=s nondiscrimination requirement.=≅ AT&T Comments at 141 (footnote omitted). However, all the Supreme Court decided was that Ait is well within the bounds of the reasonable for the Commission to opt in favor of ensuring against an anticompetitive practice [disassembling network elements].≅ *AT&T v. Iowa Utils. Bd.*, 119 S. Ct. at 738. The Court did not hold that the nondiscrimination requirement allowed the Commission to ignore the precise language of the section 251(c)(3).

Finally, AT&T argues that the Eighth Circuit assumed that ILECs would permit CLECs to combine elements themselves, but that ILECs have not allowed this. AT&T Comments at 139, 141-42. If AT&T believes that some ILECs are not fulfilling their obligations, AT&T may file

[47] *Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837, 842-43 (1984).

a complaint. However, mere allegations that some ILECs are not complying with the statute=s requirements do not give the Commission leave to ignore the Eighth Circuit=s decision.[48]

2. ILECs Cannot Be Required To Provide CLECs With Extended Loops.

[48] AT&T also urges the Commission to readopt Rules 305(a)(4) and 311(c), which required that ILECs provide CLECs with better-than-parity access and interconnection. AT&T Comments at 144. AT&T argues that, since these rules stemmed from the same Aconsiderations≅ as Rules 315(c)-(f) and the Eighth Circuit supported its decision on the same (now allegedly untenable) bases, the Commission can therefore readopt them. However, for the reasons noted above, none of the grounds cited by AT&T give the Commission authority to overrule the Eighth Circuit=s determinations. Once again, therefore, the unbundling rules that AT&T and the Commission elected not to challenge before the Supreme Court cannot now be reinstated.

A number of commenters suggest the Commission should require ILECs to provide the extended link (loop plus transport) and the enhanced extended loop (loop to the central office plus dedicated transport from the central office to the office in which the CLEC is collocated plus access to multiplexing and concentration equipment) as unbundled network elements.[49] As noted above, ILECs are not required to combine elements for CLECs or to provide combinations to CLECs that they do not provide to themselves. Moreover, the extended loop does not meet the Aimpair≅ standard. As explained in Section III.A above, CLECs can obtain this functionality in several ways other than as a UNE. They can self-provision the needed facilities through collocation, they can purchase the transport needed from third parties, they can obtain the loop-transport combination through ILEC special access tariffs, and they can buy dedicated transport. Since all of these methods will provide the CLECs with the same functionality, CLECs cannot be impaired by a lack of access to the extended loop or the enhanced extended loop.

D. ILECs Are Only Required to Provide Conditioned Loops To CLECs Where ILECs Provide Such Loops To Themselves and Loops Are Considered Subject to an Unbundling Obligation.

The Eighth Circuit=s decision confirmed that ILECs do not have to provide CLECs with better service or facilities than ILECs provide to themselves. GTE Comments at 86-87. As explained above, despite AT&T=s claims to the contrary, the Supreme Court=s decision in *Iowa Utilities Board* did not undermine this determination. Therefore, ILECs must provide CLECs

[49] *See, e.g.*, ALTS Comments at 62-69; AT&T Comments at 137-138.

with conditioned loops as UNEs only where ILECs themselves offer services that require such loops. Nevertheless, AT&T argues that:

> The Commission has correctly found -- and the Eighth Circuit has affirmed -- that the kind of loop conditioning required to provide xDSL capable loops (which involves removing all passive or active electronics such as bridge taps, low pass filters, and range extenders) constitutes a Amodification≅ necessary for incumbents to meet their obligations to provide nondiscriminatory access.[50]

This is not correct. As AT&T acknowledges, the Eighth Circuit actually stated: Awe endorse the Commission=s statement that >the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements.=≅[51] Conditioned loops do not Aaccommodate interconnection or access to network elements.≅ AT&T Comments at 76 (footnote omitted). Rather, they are a wholesale change to an existing element -- a loop -- to allow that loop to support new services. As long as ILECs provide CLECs with access to conditioned loops on the same basis as ILECs provide such loops to themselves and their customers, ILECs have met their nondiscrimination obligation. Providing conditioned loops wherever the CLEC requests them would be giving CLECs better-than-parity service.

NorthPoint suggests that ILECs find alternative Ahome run≅ copper loops by moving a customer served by copper onto fiber. NorthPoint Comments at 16. However, GTE does not

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[50] AT&T Comments at 76 (footnote omitted).

[51] *Id.* at 76 n. 166 quoting *Iowa Utils. Bd. v. FCC*, 120 F.3d at 813, n.33.

disrupt one customer=s service by moving him or her off of copper pairs to make that facility available for some other potential GTE ADSL customer. Therefore, GTE should not be required to move customers for CLECs.

GTE provides CLECs with conditioned loops as UNEs in those central offices in which GTE conditions loops for its own use. This ensures that CLECs are not at a disadvantage *vis-à-vis* GTE in the deployment of advanced services. In addition, GTE provides conditioned loops via a *bona fide* request process in those areas in which it does not provide conditioned loops to itself.

E. Inside Wire on the Customer=s Side of the Demarcation Point Is Not a Network Element, and ILECs Have No Right of Access To that Wire.

Inside wire on the customer=s side of the demarcation point is, by definition, not part of the ILEC network and therefore cannot be a network element. Even if it were part of the ILEC network, it does not meet the Aimpair≅ standard because there is substantial competition to install such wiring. In addition, the Commission has already determined that ILECs cannot exercise any residual rights they may have in inside wire on the customer=s side of the demarcation point and that customers have complete control over that wiring. GTE Comments at 89-90.

Despite the Commission=s definitive decisions in this area, some commenters state that Athe Commission should make clear that all wiring owned by the incumbent LEC will be a UNE even if it is on the customer side of the demarcation point.≅[52] This request is nonsensical. The

[52] Choice One *et al.* Comments at 24-25; *see also* Level 3 Comments at 21.

definition of the demarcation point is Athe point at which the telephone company=s facilities and responsibilities end and customer-controlled wiring begins.≅[53] ILECs cannot grant CLECs access to inside wiring on the customer=s side of the demarcation point because ILECs have no right of access to grant.[54] If CLECs need access to a customer=s inside wire, they will have to request access directly from the customer in the same way as do ILECs. If CLECs encounter difficulties with individual building owners, those problems should be dealt with directly, not by attempting to put additional burdens on ILECs.

Teligent suggests that the Commission require ILECs to move the demarcation point to the minimum point of entry (AMPOE≅). Teligent Comments at 2. However, this is already a Commission requirement for wire installed after August 13, 1990. *See* 47 C.F.R. э 68.3. Requiring ILECs to move the demarcation point in older buildings could impose significant costs on building owners. First, owners would be required to bear the costs of moving any ILEC equipment from the demarcation point to the MPOE. Second, contrary to claims of Choice One, ILECs have not depreciated the costs of all in-premises cable. Choice One *et al.* Comments at 24-25. If the demarcation point is moved, owners would have to compensate ILECs for the value

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[53] *Review of Sections 68.104 and 68.213 of the Commission=s Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, 12 FCC Rcd 11897, 11899 (1997).

[54] At most, ILECs have a residual ownership interest in some inside wire, but no right to access such wire.

of any cable between the old demarcation point and the new demarcation point. Therefore, mandating relocation of the demarcation point would impose additional costs on building owners rather than benefitting MDU tenants.

As GTE noted in its Comments, in-premises wiring located on the ILEC=s side of the demarcation point is actually an issue of sub-loop unbundling since all facilities up to the demarcation point are part of the loop. These issues are addressed below.

F. Sub-Loop Unbundling Must Be Addressed on a Case-By-Case Basis.

In its comments, GTE explained that mandatory, nationwide sub-loop unbundling would be neither consistent with section 251(d) of the Act nor practical from a technical or administrative perspective. First, sub-loop unbundling does not fall within section 251(d)(2)=s Aimpair≅ standard and would not be necessary in any event because CLECs can always take the whole loop to provide service. GTE Comments at 87. Second, sub-loop unbundling continues to raise complex technical, administrative, and operational issues given varying loop configurations and loop technologies. *Id.* As such, sub-loop unbundling should not be addressed through nationwide rules; rather, it should be provided, where feasible, through a *bona fide* request process. The Ohio PUC agrees that A[t]o date, in Ohio we have not seen evidence to suggest that cooper loops can be unbundled in a technically feasible manner. . . . It appears impossible to have a >one-size-fits-all= approach [to sub-loop unbundling] in Ohio. As a result, the [Ohio PUC] fails to see how a one-size-fits-all approach [could] possibly be implemented at the national level.≅ Ohio PUC Comments at 17.

Contrary to the suggestions of ALTS and many CLECs, mandatory sub-loop unbundling does not fall within the section 251(d)(2) statutory standard.[55] As pointed out in its comments, GTE offers sub-loop unbundling on a *bona fide* request basis in approximately 172 interconnection agreements, but has yet to receive a firm request from a CLEC in response to this option.[56] This fact strongly indicates that sub-loop unbundling is not viewed by CLECs as essential or even useful.

Moreover, the record underscores GTE=s concern that an across-the-board sub-loop unbundling requirement is not feasible from either a technical or administrative standpoint. For example, CLECs suggested a wide range of unbundling configurations and different views on precisely where such unbundling must occur in an ILEC=s network. These proposals included the placement of cards in digital loop carrier equipment,[57] access to multiplexing equipment (regardless of where the equipment is attached to the loop),[58] and Acopper wire from the customer=s premises to the remote terminal.≅[59] These proposals explicitly (or at least implicitly)

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[55] *See* ALTS Comments at 47-48; AT&T Comments at 85; Level 3 Comments at 18.

[56] GTE Comments at 89 & n.73. The Ohio PUC similarly confirms that despite a *bona fide* request process in Ohio, Athere have been no sub-loop BFRs.≅ Ohio PUC Comments at 18.

[57] NorthPoint Communications Comments at 17-18.

[58] AT&T Comments at 84-85.

[59] Covad Comments at 40.

acknowledge that the feasibility of sub-loop unbundling solutions will vary with the CLEC=s network requirements and the type of ILEC network configuration.[60]

For example, providing unbundled access to GTE multiplexing/concentration equipment would be difficult. DS1s are hard-wired into the equipment, so there is no cross-connect access available to accommodate another carrier=s DS1. Similarly, access to equipment within the remote terminal would also be problematic. The DLC remote terminal cabinets deployed by GTE are designed to house specific electronic components. There is seldom sufficient space in the cabinet for additional cabling or electronic components. If GTE or a CLEC were to attempt to add additional cabling within the ILEC=s remote terminal cabinet, the manufacturer=s warranty could be voided, leaving GTE responsible for the costs of any malfunction or damage to the equipment.

[60] *See, e.g.*, NorthPoint Communications at 17 (proposing different sub-loop unbundling requirements for copper versus fiber feeder systems).

In addition, GTE strongly disagrees with Level 3 and others who suggest that the Commission should designate Apremises and building entrance facilities such as junction and utility boxes, house and riser cable, and horizontal distribution plant≅ as unbundled network elements.[61] Unbundling of these facilities would prove nearly impossible as an administrative matter because ILECs in virtually all cases do not control access to the conduit and equipment rooms where this cable is located. Rather, these facilities are located on private property and are controlled by the building owner, and ILECs are not immune from many of the same access issues in multiple dwelling unit buildings and other settings noted by CLECs. Therefore, access to building facilities and the placement of in-premises wire are properly left to private negotiations between the CLEC and property owner.

G. None of the Miscellaneous Additional Facilities Identified as UNEs By Commenters Meets the Statutory Requirements.

Several parties asked for unbundling of facilities even beyond those cited in the Notice of Proposed Rulemaking. None of these meets the requirements of the Act, and thus none must be made available as a UNE.

For example, ALTS requests that the Commission require ILECs to unbundle ports on their data switches or routers and to provide a virtual circuit at a series of pre-defined bit rates

[61] Level 3 Comments at 21; *see also* AT&T Comments at 85, MCI WorldCom Comments at 47; MGC Communications Comments at 29-30; Teligent Comments at 4 n.4; WinStar Communications Comments at 7.

between ports. ALTS Comments at 72-75. The asserted (but erroneous) justification for this UNE is that, without such access, CLECs are unable to terminate CLEC data traffic on the ILEC data network. *Id.* ALTS is actually requesting that ILECs be required to interconnect with CLEC networks in order to facilitate the mutual exchange of traffic. ILECs are required to provide interconnection under section 251(c)(2), and GTE has entered into hundreds of interconnection agreements with CLECs. Further, access to ports and data routers is not needed for CLECs to terminate Internet Protocol (AIP≅) traffic, contrary to ALTS=s claims. IP-based traffic is predominantly routed to and from the Internet through ISPs which interconnect with ILECs. Thus, CLECs are currently terminating their data traffic on ILEC networks and will be able to continue to do so.

Covad suggests that ILECs be required to provide DS3 links between a customer=s premises and the serving wire center. Covad Comments at 50-53. GTE already provides these links to CLECs as UNEs where they are available. However, ILECs cannot be required to provide DS3 links to CLECs where ILECs do not provide such links for themselves, since this would give CLECs better-than-parity service.

Some commenters have also raised the issue of spectrum unbundling.[62] This issue is being dealt with in CC Docket No. 98-147 and is not properly raised here. In any event, as GTE will explain in its comments in that proceeding, loop spectrum neither meets the statutory definition of network element nor passes the Anecessary≅ and Aimpair≅ test. Moreover, even

[62] *See* NorthPoint Comments at 15-16; Rhythms NetConnections Comments at 17-18.

if it did, forcing ILECs to provide unbundled spectrum would undermine their incentives to deploy advanced services.

VI. THE COMMISSION SHOULD SUNSET AND REVISIT ITS UNBUNDLING REQUIREMENTS IN TWO YEARS TO ENSURE THAT THEY CONTINUE TO COMPLY WITH THE COMMANDS OF SECTION 251(d)(2).

In the *First Report and Order*, the Commission underscored the Avital≅ need to Areexamine [its] rules over time in order to reflect developments in the dynamic telecommunications industry.≅ *Id.* & 246. As Chairman Kennard stated in his testimony before the Senate Commerce Committee, A[t]raditional industry boundaries are rapidly disappearing, and the communications world is converging. Already, we are seeing glimpses of a future in which phone lines will deliver movies, cable lines will carry phone calls, and the airwaves will carry both.≅[63] The Supreme Court=s instructions on remand render even more acute the need for the Commission to reconsider its unbundling rules within a reasonable time. Because the Court made clear that the Commission=s unbundling rules could not satisfy the requirements of section 251(d)(2) unless they were based on the Aavailability of elements outside the incumbent=s network,≅ *Iowa Utils. Bd.*, 119 S. Ct. at 735, and because the Commission can predict with complete certainty that the landscape of elements available outside ILEC networks will change dramatically in the next two years, the Commission must revisit its unbundling rules to assure that they continue to comport with the letter and purpose of the Act.

[63] Oral Testimony of William E. Kennard Before the Senate Commerce Committee, at 2 (May 26,

1999).

Few commenters oppose a sunset of the Commission=s unbundling rules when coupled with Commission reconsideration of the marketplace evidence concerning the availability of substitute elements. Nevertheless, AT&T argues that the Commission should not reexamine its unbundling obligations because the Commission Awould have no way at this time of knowing whether market conditions would actually support elimination of the unbundling requirement for a particular UNE at the sunset date.≅ AT&T Comments at 58. But in its own comments, AT&T concedes that the Ageneral availability of cable telephony≅ will Again momentum . . . after 2000.≅ *Id.* at 71. Indeed, in the eight representative GTE markets studied by PNR, at least four different companies -- AT&T, Cox Communications, MediaOne (planning to merge with AT&T), and Time Warner Telecom -- plan to roll out cable-based local service within the next two years. PNR Report at 29, 31, 75. Even Congress concluded when adopting the Act that cable-based local service will create Ameaningful facilities based competition≅ for ILEC service, Agiven that cable services are available to more than 95% of United States homes.≅ H.R. Conf. Rep. No. 104-230, at 148 (1996). AT&T=s opposition to a sunset of the Commission=s unbundling rules -- like its comments generally -- therefore cannot be squared with its own behavior in the marketplace.

AT&T further claims that the Commission should not set a certain sunset date because doing so Awould encourage the incumbent LECs to withhold and slow-roll access to UNEs in anticipation of the obligation being eliminated.≅ AT&T Comments at 58. But the Commission has numerous enforcement mechanisms in place to police any real (as opposed to imagined)

abuses and the vague assertion that ILECs have an incentive to Aslow-roll access≅ cannot overcome the Commission=s obligation to ensure that its unbundling rules do not become so stale as to injure competition. Thus, commenters of every stripe -- from IXCs to CLECs and CLEC trade associations, to state commissions -- uniformly agree that the Commission must revisit its unbundling requirements within a reasonable time to account for changes in technology and the availability of substitutes to ILEC elements.

Contrary to AT&T=s position, MCI WorldCom agrees that Athe Commission itself should, after a fixed period of time, review its decisions to require particular elements to be unbundled nationwide.≅ MCI WorldCom Comments at 11. This conclusion is echoed by CLECs like Cox Communications, whose comments recognize that as Athird-party vendors . . . continue to increase the variety, quality and efficiency of the[ir] services and equipment,≅ the Agap between the network elements available from these parties and those that CLECs can only now obtain from ILECs will steadily narrow.≅ Cox Comments at 37-38. Similarly, Rhythms Netconnections concludes that the Commission cannot Amaintain the integrity≅ of section 251(d)(2)=s standards unless it recognizes Awhen unbundled access to an ILEC network element is either no longer required for a CLEC to offer its services or a comparable element becomes available on the wholesale market.≅ Rhythms Comments at 27.

For this same reason, ALTS likewise agrees that the Commission should review its unbundling requirements every two years Ain response to changes in technology and the development of competitive wholesale markets for network elements.≅ ALTS Comments at 6.

This two-year proposal is echoed by the Florida PSC, whose comments underscore the risk that the Commission=s unbundling requirements will quickly be rendered Aobsolete≅ by the growth in Aavailability of UNEs from sources other than ILECs.≅ Florida PSC Comments at 8.

The Commission has therefore been presented with a near-consensus among commenters that a sunset is essential to the success of the Act=s pro-competitive enterprise. As Cox Communications concludes, maintaining Anetwork elements on the UNE list≅ beyond the point where substitutes are unavailable in the marketplace Awill further reduce the incentive for CLECs and third-party vendors to develop their own facilities.≅ Cox Comments at 38. To guarantee that its unbundling rules do not dilute these critical incentives to compete -- a result fundamentally at odds within the plain command of section 251(d)(2) and the Act=s pro-competitive purpose -- the Commission should sunset and revisit within two years any unbundling obligations it imposes.

CONCLUSION

For the foregoing reasons, the Commission should adopt the proposed rules submitted by GTE in its Comments.

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